(19,365.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 267.

FRANCIS B. SWEENEY AND HALBERT J. PORTERFIELD, PARTNERS AS SWEENEY AND PORTERFIELD, PLAINTIFFS IN ERROR,

vs.

CARTER OIL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 24, 1904.

1 *Transcript of Record.*

Be it remembered, that, heretofore, to-wit: on the 17th day of April, 1903, came Sweeney & Porterfield, by V. B. Archer, their attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of West Virginia, at Parkersburg, their præcipe, which is in the words and figures following, to-wit:

Præcipe.

FRANCIS B. SWEENEY, a Resident in and Citizen of the State of New York, and Halbert J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners Doing Business under the Firm Name and Style of Sweeney & Porterfield, Plaintiffs, vs. CARTER OIL COMPANY, a Corporation Created, Organized, and Existing under and by Virtue of the Laws of the State of West Virginia, and as Such a Citizen Thereof, Defendant.	Trespass on the Case. In Assumpsit. Damages, $20,000.00.

To L. B. Dellicker, Esq., clerk circuit court, northern district of West Virginia:

You will please issue summons to the defendant, Carter Oil Company, a corporation created, organized and existing under and by virtue of the laws of the State of West Virginia, and as such a citizen thereof, in the above-entitled cause, returnable on the first Monday in May, 1903.

V. B. ARCHER,
Attorney for Plaintiffs.

Dated Parkersburg, W. Va., April 17th, 1903.

2 *Summons.*

UNITED STATES OF AMERICA,
Northern District of West Virginia, } *ss:*

The President of the United States of America to the marshal of the northern district of West Virginia, Greeting:

You are hereby commanded to summon Carter Oil Company, a corporation created, organized and existing under and by virtue of

the laws of the State of West Virginia, and as such a citizen thereof, to appear before the judges of the circuit court of the United States, in and for the northern district of West Virginia, at the city of Parkersburg, at rules to be held in the clerk's office of the said court on the first Monday in May, next, to answer unto Francis B. Sweeney, a resident in and citizen of the State of New York, and Halbert J. Porterfield, a resident in and citizen of the State of Pennsylvania, partners doing business under the firm name and style of Sweeney & Porterfield, of a plea of trespass on the case. In assumpsit. Damages $20,000.00, and have then there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of April, A. D., 1903, and in the 127th year of the Independence of the United States of America.

[SEAL.] L. B. DELLICKER,
Clerk Circuit Court U. S., N. D. W. Va.

(Return endorsed.)

Executed the within summons this 18th day of April, 1903, as to the within named Carter Oil Company, a corporation, by delivering a true copy of the within into the hands of George McCauley, the duly appointed attorney in fact for said Carter Oil Company to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, in the county of Tyler, West Virginia, on the said 18th day of April, 1903, the said George McCauley being a resident of said Tyler county, West Virginia, at the time of such service.

C. D. ELLIOTT,
U. S. Marshal,
By G. W. SINE, *Deputy.*

Marshal's fees $2.54.

3 *Declaration and Bill of Particulars.*

(Filed May 4, 1903.)

In the Circuit Court of the United States for the Northern District of West Virginia.

Francis B. Sweeney, a resident in and citizen of the State of New York, and Halbert J. Porterfield, a resident in and citizen of the State of Pennsylvania, partners doing business under the firm name and style of Sweeney & Porterfield, complain of the Carter Oil Company, a corporation created, organized and existing under and by virtue of the laws of the State of West Virginia, and as such a citizen thereof, of a plea of trespass on the case, in assumpsit, for that, heretofore, to-wit, on the — day of April, 1901, in the county of Har-

rison, in the State of West Virginia, and in the said northern district of West Virginia aforesaid, in consideration that the said plaintiffs agreed with the said defendant to perform and complete certain work for the defendant, that is to say: the plaintiffs agreed to drill and complete for the defendant a well for petroleum or gas on the John Carpenter farm, in Harrison county, West Virginia, at the district aforesaid, which said well was known and called No. 2, on the said John Carpenter farm, and was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum known as the Gordon sand, unless sooner abandoned by the direction of the said defendant, and of a diameter, after the said first string of 10 inch casing had been put into said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ in. string of casing, and 5 3-16 inch string of casing in said well, in succession as said well progressed in depth, and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality, and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in
4 succession as said well progressed in depth, and as need should be found for using said strings of casing in said well; the said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe, and connections at the well; also, all water was to be furnished by the said defendant; all of which parts, material, casing, machinery and appliances so to be furnished by the said defendant, were to be so furnished by it at the time and when and as needed, and was to be of good quality and kind sufficient to permit and enable the plaintiffs to speedily, and without delay or unnecessary expense or interruption, drill and complete said well in the manner and to the depth aforesaid.

For the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the labor and material so to be furnished by the plaintiffs about the drilling and completing of said well, and incident thereto, the said defendant agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so to be drilled by the plaintiffs, on the 10th of the month next following the month in which said well should be so completed by the plaintiffs. And the said defendant promised the plaintiffs to permit them to perform and complete the said work of drilling and completing said well on the terms aforesaid; and that the casing which the said defendant would furnish for said well,

and every part and each string or line thereof, would be sufficiently thick, strong and durable, when put into said well, to withstand the pressure thereon in said well, and so that it would not from the pressure or weight of said casing, or other ordinary cause, become bent, collapsed or obstructed while the plaintiffs were engaged in their employment of drilling and completing said well, and so that the plaintiffs would not, by such means, be hindered, delayed or prevented from performing and completing said work of drilling said well on the terms aforesaid.

Plaintiffs aver that they did commence and in part perform the said work upon the terms aforesaid and did bore and drill said well to a great depth, to-wit: to the depth of 3,100 feet, and were able, ready and willing to duly and fully perform and complete said work of drilling said well on their part through the Gordon sand, and to complete said well in all respects according to the terms of said contract, whereof the said defendant always had notice, to-wit: at the district aforesaid. But the plaintiffs were thereafter prevented and hindered in the further work of drilling and completing said well according to said contract, by the acts of the said defendant in wrongfully and absolutely failing and refusing to furnish the plaintiffs with casing for said well sufficiently thick, strong and durable, when put into said well, to withstand the pressure thereon in said well, and so that it would not, from the pressure or weight of said casing or other ordinary cause, become bent, collapsed and obstructed, as the said defendant had promised the plaintiffs it would do, but, on the contrary thereof, the plaintiffs aver that the said defendant had furnished to the plaintiffs, and there had been put into said well, as there had been occasion therefor in the course of drilling said well to the aforesaid depth of, to-wit: 3,100 feet, a string of, to-wit: 10 inch casing, a string of, to-wit: 8¼ inch casing, and a string of, to-wit: 6⅝ inch casing, all and each string of which casing was represented by the defendant, when the same is furnished to the plaintiffs, to be sufficient for the purpose of casing said well, and to be sufficiently thick, strong and durable to withstand the pressure which would be thereon in said well, and that the said casing would not, nor would any part thereof, from the pressure thereon in said well, or from the weight of said casing, or from any other *other* ordinary cause, bend, collapse or become obstructed so as to hinder, delay or prevent the plaintiffs from completing the said well according to said contract. And plaintiffs aver that they, relying on said promises and representations of the said defendant that said casing, and every part thereof, was sufficiently thick, strong and durable as to withstand the pressure which would be thereon in said well, and that said casing would not, nor would any part thereof, bend, collapse or become obstructed so as to hinder, delay or prevent the plaintiffs from completing said well according to said contract, did use and put into said well the casing so furnished to the plaintiffs by the said defendant. And the plaintiffs, in fact, say that the said casing so furnished by the said defendant, and which was put into

said well was not sufficiently thick, strong and durable to withstand the pressure thereon in said well, but the same, and especially the said string of, to-wit: 6⅝ inch casing, so put into said well, was so thin, weak and unsubstantial that it would not withstand the ordinary pressure thereon in said well, but said string of, to-wit: 6⅝ inch casing did, from the weight and pressure then in said well, or from other ordinary cause, and without the fault or neglect of the plaintiffs, bend, collapse and become obstructed, so that it became and was impossible for the plaintiffs, by any means, to further drill and comple- said well according to said contract, and the plaintiffs aver that the failure of the said defendant to furnish casing sufficient to withstand the said pressure in said well, and by
6 reason of the insufficiency of said string of, to-wit: 6⅝ inch casing, and of the bending, collapsing and obstruction of said well caused thereby, the plaintiffs were hindered and prevented from completing said work of drilling said well, whereby the plaintiffs have lost the profits which would otherwise have arisen and accrued to them from the completion of said work, and the price and value of the work by them so done, to the damage of the plaintiffs $20,000.00.

Second count. And for this also, to-wit: that here-fore, to-wit: on the day and year last aforesaid, at the district aforesaid, after the casing in said well had collapsed and become obstructed, so that it became and was impossible for the plaintiffs to complete the said well, as in said first count is alleged, the plaintiffs, at the special instance and request of the defendant, and at the risk and expense of the defendant, furnished tools, labor and material to the defendant for the said well so obstructed by the collapsing of the casing aforesaid, and at the special instance and request of the defendant attempted to take and draw therefrom the said insufficient and collapsed casing which was so in said well, as in the said first count is alleged, and to put therein other and sufficient casing, in order that the same could be drilled and completed through the Gordon sand, where it was believed oil would be found in said well, and while so engaged in attempting to remove said casing and obstruction from said well, a valuable string of drilling tools of the plaintiffs of great value, to-wit: of the value of $205.00, without any fault of the plaintiffs, was caught in same by the said collapsed casing and other matter closing in on said tools, so that the said tools were lost to the plaintiffs.

In consideration of the premises, the defendant then and there promised to pay the plaintiffs, on request, so much money as the said plaintiffs, for said tools, labor and material so furnished to the said defendant in attempting to take and draw from said well said casing, reasonably deserved to have, and the plaintiffs aver that they reasonably deserved to have therefor the sum of $800.00 whereof the defendant then and there had notice at the district aforesaid.

Third count. And for this, also, to-wit: that heretofore, to-wit,

on the — day of August, in the county of Harrison in the State of West Virginia, and in the said northern district of West Virginia aforesaid, in consideration that the plaintiffs agreed with the said defendant to perform and complete certain other work for the defendant, that is to say: the plaintiffs agreed to drill and
7 complete for the defendant a certain well for petroleum or gas, on the John Carpenter farm, in Harrison county, West Virginia, at the district aforesaid, which said well was located near by the said well No. 2 mentioned in the first and second counts of this declaration, and was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum known as the Gordon sand, unless sooner abandoned by the direction of the said defendant, and of a diameter, after the said first string of casing had been put into said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ inch string of casing, and 5 3-16 inch string of casing in said well, in succession as said well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succession as said well progressed in depth and as need should be found for using said strings of casing in said well. The said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe and connections at the well; also, all water was to be furnished by the said defendant; all of which parts, material, casing, machinery and appliances, and each and every part and parcel thereof, so to be furnished by the said defendant, were to be so furnished by it at the time and when and as needed, and was to be of good quality and kind sufficient to permit and enable the plaintiffs to speedily and without delay or unnecessary expense or interruption, drill and complete said well in the manner and to the depth aforesaid. And it was also further agreed that if the said defendant desired to shoot or torpedo said well at the cost and expense of the said defendant, the plaintiffs would clean out said well, after said shot, at the cost and expense of the plaintiffs, to the satisfaction of the said defendant, which shooting of said well, if the defendant elected to shoot the same, was to be done in a careful and prudent manner, so that the same could be cleaned out by the plaintiffs according to the said contract.

8 For the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the labor and material so to be furnished by the plaintiffs about the drilling and completing of said well, and incident thereto, the said defendant agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so to be drilled by the plaintiffs on the 10th of the month next following the month in which said well should be so completed by the plaintiffs, and the said defendant promised the plaintiffs to permit them to perform and complete the said work of drilling and completing said well on the terms aforesaid, without any unnecessary delay, and that if the said defendants should desire to shoot or torpedo said well, after the same had been drilled to the depth as required by said contract, it would do so in a careful and prudent manner, so that the said well could be cleaned out by the plaintiffs without unnecessary or unusual delay, and completed according to said contract, and so that the walls of said well would not cave, fall in and obstruct the said well, so as to unnecessarily delay the plaintiffs in cleaning the same out.

Plaintiffs aver that they did commence and in part perform said work upon the terms aforesaid, and did bore and drill said well to a great depth, to-wit, to the depth of 3,185 feet, at which said depth the plaintiffs had drilled said well through the Gordon sand, and there had been found in said well a showing for oil, and the plaintiffs were able, ready and willing to complete said well and to clean the same out in all respects according to the terms of said contract, whereof the said defendant always had notice, to-wit, at the district aforesaid. And the plaintiffs aver that after said well had been drilled to the depth aforesaid, and after a showing for oil in the Gordon sand had been found as aforesaid, the said defendant desired to shoot or to torpedo said well, and did, in pursuance of the privilege and right reserved to it by said contract, undertake to shoot or torpedo said well, and did in fact put into said well a torpedo or shot of nitro-glycerine, or other highly explosive material, and caused the same to be exploded in said well. And the plaintiffs aver that the said shot or torpedo was by the said defendant put into said well in such a negligent, careless and improper manner, and was exploded in such a careless and improper manner, that by reason of said shot or torpedo the walls of said well were knocked down and caused to cave and fall in, in an unusual and to an unnecessary extent, so that by reason of the negligent and improper manner in which said defendant shot and torpedoed said well, the

9 plaintiffs were greatly hindered and delayed and put to unnecessary and unusual and unreasonable expense in cleaning out said well, and were compelled to lay out and expend large sums of money, to-wit, $800.00, for labor, material, tools and appliances, which they would not have been required to pay out, expend and perform if the said well had been shot in a proper, prudent and careful manner.

In consideration of the premises, the defendant then and there

promised to pay the plaintiffs on request, so much money as the said plaintiffs, for said labor, tools and material so furnished to the said defendant in cleaning out said well, which was caused by the negligent manner in which said well had been shot and torpedoed, reasonably deserved to have, and the plaintiffs aver that they reasonably deserved to have therefor the sum of $800.00, to the damage of the plaintiffs $800.00.

Fourth count. And for this, also, to-wit: that heretofore, to-wit, on the day and year last aforesaid, at the district aforesaid, the said plaintiffs, on the — day of August, 1901, in the county of Harrison, in the State of West Virginia, and in the said northern district of West Virginia aforesaid, in consideration that the said plaintiffs agreed with the said defendant to perform and complete certain other work for the defendant, that is to say: the plaintiffs agreed to drill and complete for the defendant a certain oil well for petroleum or gas on the John Carpenter farm in Harrison county, West Virginia, which well was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum known as the Gordon sand, unless sooner abandoned by the direction of the said defendant, and of a diameter, after the said first string of 10 inch casing had been put into said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ inch string of casing, and 5 3-16 inch string of casing in said well, in succession as said well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a
10 string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succession as said well progressed in depth and as need should be found for using said strings of casing in said well. The said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe and connections at the well; also, all water was to be furnished by the said defendant; all of which parts, material, casing, machinery and appliances, and every part thereof, so to be furnished by the said defendant, were to be so furnished by it at the time and when and as needed, and were to be of good quality and kind sufficient to permit and enable the plaintiffs to speedily and without delay or unnecessary expense or interruption, drill and complete said well in the manner and to the depth aforesaid.

For the drilling and completion of said well in the manner and to

the depth aforesaid, as well as for the labor and material so to be furnished by the plaintiffs about the drilling and completion of said well, and incident thereto, the said defendant agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so to be drilled by the plaintiffs, on the 10th of the month next following the month in which said well should be so completed by the plaintiffs, and the said defendant promised the plaintiffs to permit them to perform and complete the said work of drilling said well on the terms aforesaid; and that the engine and machinery and steam connections, and every part thereof, would be sufficiently strong and durable, with proper care and attention, to do the work of drilling said well and cleaning the same out while the plaintiffs were so using the same in their employment of drilling and completing said well. And the plaintiffs aver that they did commence and in part perform the said work upon the terms aforesaid, and did bore and drill said well to a great depth, to-wit: to the depth of 3,185 feet, and were able, ready and willing to duly and fully perform and complete said work of drilling said well on their part in all respects according to the terms of said contract, whereof the said defendant always had notice to-wit, at the district aforesaid. But the plaintiffs were thereafter unnecessarily hindered in the work of cleaning out and completing said well according to said contract, by the act of the defendant in wrongfully and absolutely failing and refusing to furnish the plaintiffs with an engine, machinery and steam connections sufficiently strong and durable, with proper care and attention, to do the work of cleaning out said well, as the said defendant had promised the plaintiffs it would do, but on the contrary
11 thereof, the plaintiffs aver that the said defendant furnished to the plaintiffs an engine and machinery and steam connections therefor which were wholly insufficient for the purpose of cleaning the said well out, and while the plaintiffs were using said engine, machinery and steam connections so furnished by the defendant for cleaning out and completing said well under said contract, in a careful and prudent manner, the said engine, machinery and steam connections broke, gave way and became disconnected, without the fault or neglect of the plaintiffs, and at a time when the plaintiffs were engaged in cleaning out said well after the same had been shot by the defendant, so that the plaintiffs were greatly hindered, delayed and put to unnecessary expense in cleaning out said well, by reason of the insufficient engine, machinery and steam connections so furnished by the defendant to the plaintiffs, and were by reason thereof compelled to lay out and expend large sums of money, to-wit: $800.00 for labor, material, tools and appliances, which they would not have been required to pay out, expend and perform if the said defendant had furnished the plaintiffs with an engine sufficiently strong and durable, and with steam connections sufficiently strong and durable, for the purpose of cleaning out said well.

In consideration of the premises, the defendant then and there promised to pay the plaintiffs, on request, so much money as the

plaintiffs, for said labor, tools and material so furnished to the said defendant in cleaning out said well, and which was caused by the failure of the defendant to furnish a sufficient engine, machinery and steam connections to clean out said well, reasonably deserved to have, and the plaintiffs aver that they reasonably deserved to have therefor the sum of $800.00, and to the damage of the plaintiffs $800.00.

Fifth count. And for this also, to-wit: that heretofore, to-wit: on the — day of August, 1901, in the county of Harrison, in the State of West Virginia, and in the said northern district of West Virginia, aforesaid, in consideration that the plaintiffs agreed with the said defendants to perform and complete certain work for the defendant, that is to say: the plaintiffs agreed to drill and complete for the defendant a certain well for petroleum or gas on the John Carpenter farm, in Harrison county, West Virginia, at the district aforesaid, which said well was located nearby the said well No. 2 mentioned in the first, second, third and fourth counts of this declaration, and

12 was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum known as the Gordon sand, unless sooner abandoned by the direction of the said defendant, and of a diameter, after the said first string of casing had been put into said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ inch string of casing, and 5 3-16 inch string of casing in said well, in succession as said well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succession as said well progressed in depth and as need should be found for using said strings of casing in said well. The said defendants was also to furnish the necessary boiler, engines, belt, bull rope, steam and gas pipe and connections at the well; also all water was to be furnished by the said defendant.

For the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the labor and material so to be furnished by the plaintiffs about the drilling and completing of said well, and incident thereto, the said defendant agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so to be drilled by the plaintiffs, on the 10th of the month next following the month in which said well should be so com-

pleted by the plaintiffs. And the plaintiffs aver that they did commence, bore, drill and complete said well aforesaid according to the terms and conditions of said contract, to a great depth, to-wit: 3,185 feet, and plaintiffs aver that although all things have been done by the plaintiffs, and all labor and material has been furnished and the said well in all respects completed in accordance with said contract, and although all times have elapsed, so that the money which the said defendant agreed to pay the plaintiffs for the drilling and completing of said well should have been paid to the plaintiffs, yet the plaintiffs aver that the said defendant has totally failed, neglected and refused to pay the plaintiffs for said
13 work, labor and material, and the money so paid out by the plaintiffs in drilling and completing said well, to the damage of the plaintiffs $20,000.00.

Sixth count.—John Carpenter No. 3.—And for this, also, to-wit: that heretofore to-wit, on the — day of June, 1901, in the county of Harrison, in the State of West Virginia, and in the northern district of West Virginia aforesaid, in consideration that the plaintiffs agreed with the said defendant to perform and complete certain work for the defendant, that is to say, the plaintiffs agreed to drill and complete for the defendant a well for petrolerm or gas on the John Carpenter farm, in Harrison county, West Virginia, in the district aforesaid, which well was known and called No. 3 on the John Carpenter farm, and was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum know- as the Gordon sand, unless sooner abandoned by the direction of said defendant, and of a diameter, after the said first string of 10 inch casing had been put into said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ inch string of casing, and 5 3-16 inch string of casing in said well, in succession as said well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality, and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succession as the said well progressed in depth and as need should be found for using said strings of casing in said well. The said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe and connections at the well; also, all water was to be furnished by the said defendant; all of which parts, material, casing, machinery and appliances, so to be furnished by the said defendant, were

to be furnished by it at the times and when and as needed, and *was* to be of good quality and kind sufficient to permit and enable the plaintiffs to speedily and without delay or unnecessary
14 expense or interruption drill and complete said well in the manner and to the depth aforesaid.

For the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the labor and material so to be furnished by the plaintiffs about the drilling and completing of said well, and incident thereto, the said defendant had agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so drilled and completed by the said plaintiffs, on the 10th of the month next following the month in which said well should be so completed by the plaintiffs. And the said defendant promised the plaintiffs to permit them to perform and complete said work of drilling and completing said well on the terms aforesaid, and that the casing which the said defendant would furnish for said well, and every part and each string or line thereof, would be sufficiently thick, strong and durable, when put into said well, to withstand the pressure thereon in said well, and so that it would not from the pressure or weight of said casing, or other ordinary cause become bent, collapsed or obstructed while the plaintiffs were engaged in their employment of drilling and completing said well, and so that the plaintiffs would not by such means be hindered, delayed or prevented in performing and completing said work of drilling said well on the terms aforesaid.

Plaintiffs aver that they did commence and in part perform the said work upon the terms aforesaid, and did bore and drill said well to a great depth, to-wit, to the depth of 1,765 feet, and were able, ready and willing to duly and fully perform and complete said work of drilling said well on their part through the Gordon sand, and to complete said well in all respects according to the terms of said contract, whereof the said defendant always had notice, to-wit, at the district aforesaid. But the plaintiffs were thereafter prevented and hindered in the further work of drilling and completing said well according to said contract, by the act of the said defendant in wrongfully and absolutely failing and refusing to furnish the plaintiffs with casing for said well sufficiently thick, strong and durable, when put into said well to withstand the pressure thereon in said well, and so that it would not from the pressure or weight of said casing, or other ordinary cause, become bent, collapsed, telescoped and obstructed, as the said defendant had promised the plaintiffs it would do, but on the contrary thereof the plaintiffs aver that the said defendant had furnished to the plaintiffs, and there had been put into said well as there had been occasion therefor in the course of drilling said well to the aforesaid depth of,
15 to-wit, 1,765 feet, a string of, to-wit, 10 inch casing, and a string of, to-wit, 8¼ inch casing, all and each string of which said casing was furnished to the plaintiffs by the said defendant, and was represented by the defendant when the same was furnished

to the plaintiffs, to be sufficiently thick, strong and durable to withstand the pressure which would be thereon in said well, and that the said casing would, not nor would any part thereof, from the pressure thereon in said well, or from the weight of said casing, or from any other ordinary cause, bend, collapse, telescope or become obstructed, so as to hinder, delay or prevent the plaintiffs from completing the said well according to said contract.

And the plaintiffs aver that they, relying on said representations and assurances of said defendant that said casing and every part thereof, was sufficiently thick, strong and durable as to withstand the pressure which would be thereon in said well, and that said casing would not, nor would any part thereof, bend, collapse, telescope or become obstructed, so as to hinder, delay or prevent the plaintiffs from completing said work according to said contract, did use and put into said well the casing so furnished to the plaintiffs by the said defendant, and the plaintiffs in fact say that the said casing so furnished by the said defendant, and which was put into said well, was not sufficiently thick, strong and durable to withstand the pressure thereon in said well, but the same, and especially the said string of, to-wit, 8¼ inch casing, so put into said well, was so thin, weak and unsubstantial that it would not withstand the ordinary pressure thereon in said well, and from other ordinary cause, and without the fault or neglect of the plaintiffs, bend, collapse, telescope and become obstructed, without any notice to the plaintiffs and while the plaintiffs had therein their drilling tools and were engaged in drilling said well, so that it became and was impossible for the plaintiffs, by any means, to further drill and complete said well according to said contract, and the plaintiffs aver that by the failure of the said defendant to furnish casing sufficient to withstand the said pressure in said well, and by reason of the insufficiency of said string of, to-wit, 8¼ inch casing, and by reason of the bending, collapsing, and telescoping of the said string of casing, and the obstruction of said well caused thereby, the plaintiffs were hindered and prevented from completing said work of drilling said well, whereby the plaintiffs have lost the profits which would otherwise have arisen and accrued to them from the completion of said work, and the price and value of the work *done* by them so done, to the damage of the plaintiffs $20,000.00.

16 Seventh count. And for this, also, to-wit: that heretofore, to-wit, on the day and year last aforesaid, at the district aforesaid, after the casing in said well in the preceding count mentioned had collapsed, telescoped and become obstructed, so that it became and was impossible for the plaintiff to complete the said well, as in said count is alleged, the plaintiffs, at the instance and request of the defendant, and at the risk and expense of the defendant, furnished tools and material to the defendant for the said well so obstructed by the collapsing of the casing aforesaid, and attempted to draw therefrom the said insufficient and collapsed and telescoped casing, as well as said tools of the plaintiffs which had

been caught in said well by the collapsing of said casing, and to put therein other and sufficient casing, in order that the same could be drilled and completed through the Gordon sand, where it was believed oil would be found in said well.

In consideration of the premises, the defendant then and there promised the plaintiffs to pay the plaintiffs, on request, so much money as the said plaintiffs, for said tools, labor and material so furnished to the said defendant in attempting to take and draw from said well said collapsed and telescoped casing and tools which were so in said well, reasonably deserved to have, and the plaintiffs aver that they reasonably deserved to have thereafter the sum of $1,000.00, whereof the defendant then and there had notice at the district aforesaid.

Eighth count. And for this, also, to-wit: that heretofore, to-wit, on the — day of August, 1901, in the county of Harrison, in the State of West Virginia, and in the northern district of West Virginia aforesaid, in consideration that the plaintiffs agreed with the said defendant to perform and complete certain work for the defendant, that is to say: the plaintiffs agreed to drill and complete for the defendant a well for petroleum or gas on the John Carpenter farm in Harrison county, West Virginia, in the district aforesaid, which well was located near by the well No. 3 mentioned in the sixth count of this declaration, and was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum known as the Gordon sand, unless sooner abandened by the direction of the said defendant, and of a diameter, after the said first string of casing had been put into said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ inch string of casing, and 5 3-16 inch string of casing in said well, in succession as said
17 well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality and sufficient for the purpose — drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succsesion as said well progressed in depth and as need should be found for using said strings of casing in said well. The said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe connections in the well; also, all water was to be furnished by the said defendant.

For the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the labor and material so to

be furnished by the plaintiff about the drilling and completing of said well, and incident thereto, the said defendant agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so to be drilled by the plaintiffs, on the 10th of the month next following the month in which said well should be so completed by the plaintiffs. And the plaintiffs aver that they did commence, bore, drill and complete said well aforesaid, according to the terms and conditions of said contract, to a great depth, to-wit, 3,185 feet, and plaintiffs aver that although all things have been done by the plaintiffs, and all labor and material has been furnished and the said well in all respects completed in accordance with said contract, and although all times have elapsed, so that the money which the said defendant agreed to pay the plaintiffs for drilling, and completing of said well should have been paid to the plaintiffs, yet the plaintiffs aver that the said defendant has totally failed, neglected and refused to pay the plaintiffs for said work, labor and material, and the money so paid out by the plaintiffs in drilling and completing said well, to the damage of the plaintiffs, $20,000.

Ninth count.—Garner No. 2.—And for this also, to-wit: that heretofore, to-wit: on the — day of November, 1901, in the county of Harrison, in the State of West Virginia, and in the said northern district of West Virginia aforesaid, in consideration that the
18 plaintiffs agreed with the said defendant to perform and complete certain work for the defendant, that is to say: the plaintiffs agreed to drill and complete for the defendant a certain other well for petroleum or gas on the — Garner farm, in Harrison county, West Virginia, at the district aforesaid, which said well was known as well No. 2 on said — Garner farm, and was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum known as the Gordon sand, unless sooner abandoned by the direction of the said defendant, and of a diameter, after the said first string of casing has been put in said well, so as to permit the use of an 8¼ inch string of casing, 6⅝ inch string of casing, and 5 3-16 inch string of casing in said well, in succession as said well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor and tools and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6⅝ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succession as said well progressed in depth and as need should be found for using said strings of casing in said

well. The said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe and connections at the well; also, all water was to be furnished by the said defendant; all of which parts, material, casing, machinery and appliances, and each and every part and parcel thereof, so to be furnished by the said defendant, were to be so furnished by it at the time and when and as needed, and was to be of good quality and kind sufficient to permit and enable the plaintiffs to speedily and without delay or unnecessary expense or interruption, drill and complete said well in the manner and to the depth aforesaid. And it was also further agreed that if the said defendant desired to shoot or torpedo said well at the cost and expense of the said defendant, the plaintiffs would clean out said well after said shot, at the cost and expense of the plaintiffs, to the satisfaction of the said defendant, which shooting of said well, if the defendant elected to shoot the same,
19 was to be done in a careful and prudent manner, so that the same could be cleaned out by the plaintiffs according to said contract.

For the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the tools, labor and material so to be furnished by the plaintiffs about the drilling and completing of said well, and incident thereto, the said defendant agreed to pay the plaintiffs one and 10-100 dollars per foot for each foot in depth of said well so to be drilled by the plaintiffs, on the 10th of the month next following the month in which said well should be so completed by the plaintiffs; and the said defendant promised the plaintiffs to permit them to perform and complete the said work of drilling and completing said well on the terms aforesaid, and that if the said defendant should desire to shoot or torpedo said well after the same had been drilled to the depth as required by said contract, it would do so in a careful and prudent manner, so that the said well could be cleaned out by the plaintiffs and completed according to said contract, and so that the said well would not be obstructed or become bridged so as to prevent the plaintiffs from cleaning the same out according to said contract. Plaintiffs aver that they did commence and in part perform the said work upon the terms aforesaid, and did bore and drill said well to a great depth, to-wit: to the depth of 3,090 feet, at which depth oil and gas had been found in said well, and the further drilling thereof at the direction of the defendant was stopped, and the plaintiffs were able, ready and willing to complete said well and to clean the same out in all respects according to the terms of said contract, whereof the said defendant always had notice, to-wit, at the district aforesaid. And the plaintiffs aver that after said well had been drilled to the depth aforesaid, and after oil and gas had been found therein, the said defendant desired to shoot or torpedo said well, and did, in pursuance of the privilege and right reserved to it by said contract, undertake to shoot or torpedo said well for the purpose of increasing the production thereof, and did, in fact, put into said well a torpedo or shot of nitro-

glycerine, or other highly explosive material, and did explode said shot in said well; and plaintiffs aver that by the negligent and careless manner in which said defendant conducted the work of shooting or exploding said torpedo or shot, the said well became bridged or obstructed a short distance, to-wit, 30 feet from the top of said well, and there was in said well a heavy flow or pressure of gas, which was by the said bridge and obstruction aforesaid confined and held in said well below the said bridge and obstruction, and pressing against said bridge and obstruction, so that it thereby became and was impossible to get the tools into the said well for the purpose of cleaning the same out, and by reason of the said bridge and the gas pressure then confined in said well, it became and was dangerous and impossible, without danger to the lives of the plaintiffs and their employés, to undertake to clean out and complete said well according to the terms of said contract, or to attempt to do so, of all of which the said defendant had notice, to-wit, at the district aforesaid. And the plaintiffs were thereafter by said defendant directed and required to quit further work on said well, and to remove their tools therefrom; and the plaintiffs were thereafter and thereby prevented and hindered in their further work of completing said well according to said contract; by the said wrongful and negligent acts of the said defendant, and by the direction of the said defendant so given to the plaintiffs to quit further work on said well, and to remove their tools the-from, whereby the plaintiffs have lost the profits which would otherwise have arisen and accrued to them from the completion of said work, and the price and value of the work so by them done, to the damage of the plaintiffs $20,000.00.

Tenth count—Craig No. 4.—And for this, also, to-wit: that heretofore to-wit, on the — day of ——, 1900, the said plaintiffs, at the special instance and request of the said defendant, bargained with the said defendant to drill and complete for the defendant a well for petroleum or gas on the Craig farm, in Doddridge county, West Virginia, at the district aforesaid, which said well was to be known and called Craig No. 4 on the said Craig farm, and which said well was to be commenced with- ten days from the said — day of ——, 1900, and the work of drilling and completing the same was to be prosecuted actively and continuously, Sundays excepted, to completion, and was to be completed within ninety days from the said — day of ——, 1900, unless the said defendant should consent in writing to an extension of time for the completion thereof, and was to be drilled of a diameter so as to permit the use of 10 inch casing as the first string or line of casing to be used in said well, and was to be drilled to and through the stratum, known as the Gordon sand, unless sooner abandoned by the direction of the said defendant, and of a diameter, after the said first string of casing had been put into said well so as to permit the use of an 8¼ inch string of casing, 6¼ inch string of casing, and

5 3–16 inch string of casing in said well, in succession as said
21 well progressed in depth and as need should be found for using casing in said well, for the purpose of casing off such water and caves in said well as would be encountered in drilling said well, in order that the same could be drilled, completed and operated as an oil or gas well. The plaintiffs were to furnish the fuel and pay all expenses and furnish all labor, and do everything necessary to drill and complete said well, except that the said defendant was to furnish a complete carpenter's rig of good quality and sufficient for the purpose of drilling said well, and was also to furnish a wooden conductor necessary for said well, a string of 10 inch casing, a string of 8¼ inch casing, a string of 6¾ inch casing, and a string of 5 3-16 inch casing, and all other casing and pipe to be used in said well, in succession as said well progressed in depth and as need should be found for using said strings of casings in said well. The said defendant was also to furnish the necessary boiler, engine, belt, bull rope, steam and gas pipe and connections at the well; also, all water was to be furnished by the said defendant, and the said defendant agreed with the plaintiffs that for the drilling and completion of said well in the manner and to the depth aforesaid, as well as for the labor, material and tools so to be furnished by the plaintiffs about the drilling and completing of said well, and incident thereto, the said defendant would pay the plaintiffs $1.25 per per foot for each foot in depth of said well so to be drilled by the plaintiffs, on the 10th of the month next following the month in which said well should be so completed by the plaintiffs; and the said defendant promised the plaintiffs to permit them to perform and complete said well on the terms aforesaid. And the plaintiffs aver that they, in pursuance of said contract, and at a great expense to the plaintiffs, provided themselves with all necessary tools, labor and other material to be by them furnished and provided for said well, and engaged labor and help necessary to do and perform and drill and complete said well in all respects according to the said contract, and were ready and willing at all times thereafter to so drill, bore and complete said well in pursuance of the said contract so made by the plaintiffs with the said defendant, and although the said time for the drilling of said well, as aforesaid, has long since elapsed, and the said plaintiffs have always been ready and willing to drill and complete said well in all respects according to the said contract, and to furnish all labor, material and appliances by them to be furnished therefor, and to drill and complete the said well for the price aforesaid, to wit, at the district aforesaid, whereof the said defendant hath always had notice, yet the said defendant, not
22 regarding its promise and undertaking, but contriving and intending to deceive and defraud the plaintiffs in this behalf, did not, or would within the time aforesaid, or at any time afterwards, permit the plaintiffs to so drill and complete said well at the said place aforesaid, or elsewhere, but wholly neglected and refused so to do, whereby the plaintiffs have lost and been deprived of divers

great gains and profits which might and otherwise would have arisen and accrued to them from the drilling and completing of said well as aforesaid, to-wit, at the district aforesaid, to the damage of the plaintiffs $20,000.00.

Common counts. And for this, also, to-wit: For that, whereas, the defendant, on the — day of April, 1902, at the district aforesaid, was indebted to the plaintiffs in the sum of $20,000.00 for the price and value of goods, wares, chattels and effects before that time bargained and sold by the plaintiffs to the defendant at its request, and in the like sum for work and services before that time done and bestowed, and materials for the same work furnished by the plaintiffs for the defendant at its request, and in the like sum for money before that time lent by the plaintiffs to the defendant at its request, and in the like sum for money before that time paid and expended by the plaintiffs for the use of the defendant at its request, and in the like sum *of* money before that time received by the defendant for the use of the plaintiffs, and in the like sum for money found to be due from the defendant to the plaintiffs on account then and there stated between them; and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiffs to pay them, on request, the several sums of money so due to the plaintiffs as aforesaid; yet the defendant, though often requested, has not paid the said several sums, or either of them, or any of said several sums in said several counts above mentioned, or any part thereof, to the plaintiffs, but refuses so to do; by means whereof the said plaintiffs say that they have been damaged in the sum of $20,000.00. And therefore they bring this suit.

V. B. ARCHER,
WM. BEARD,
Attorneys for Plaintiffs.

23 In the Circuit Court of the United States for the Northern District of West Virginia.

SWEENEY & PORTERFIELD
vs.
THE CARTER OIL COMPANY. } In Assumpsit.

The Carter Oil Company to Sweeney & Porterfield, Dr.

1900.	To damages for failure to permit the plaintiffs to drill Craig No. 4 according to contract	$1,700 00
1901.		
May 14 to June 5.	To cleaning out G. E. Harbert No. 3, 20 days @ $14.00 per day.....	280 00
Apr. 24 to June 15.	To drilling John Carpenter No. 2, 3,100 feet, @ $1.10 per foot.....	3,410 00

	To one set of drilling tools caught in John Carpenter No. 2	205 00
	To labor, tools, &c., furnished for casing in John Carpenter No. 2, as follows:	
	Labor of hands while fishing	200 00
	Gas for fuel	25 00
	Rent of fishing tools and freight on same	127 54
	Teaming	20 00
July —.	To moving rig from Carpenter No. 2 to new hole	151 50
Aug. 2 to Oct. 14.	To drilling 3,185 feet new hole @ $1.10 per feet foot	3,503 50
Oct. 15 to Nov. 15.	To extra work in cleaning out new hole at John Carpenter No. 2, caused by negligence in shooting the well and by breaking of the steam connections, 42 days @ $14.00 per day	588 00
Aug. 19.	To cleaning out and drilling deeper and cleaning out again W. M. Tate No. 1, 31 days @ $30.00 per day	930 00
June 20 to July 14.	To drilling 1,725 feet in John Carpenter No. 3, @ $1.10 per foot	1,897 50
	To tools lost in John Carpenter No. 3, as follows:	
	One 5¼ inch stem, 35 ft. long	135 00
	One 8 inch bit	40 00
24	Two new sets of jars	110 00
	One 8 inch slip socket, new	80 00
	One rope knife	16 00
	Two rope sockets @ $17.00 each	34 00
	One 24 ft. 4¼ inch sinker	50 00
	One new steel casing bowl	
	To labor, &c., while fishing in John Carpenter No. 3, as follows:	
	Labor	228 00
	Gas for fuel	25 00
	Teaming	20 00
1901.	To moving rig from Carpenter No. 3 to new hole	160 94
Aug. 15 to Oct. 29.	To drilling 3,215 feet new hole at John Carpenter No. 3, @ $1.10 per foot	3,536 50
	To drilling Garner No. 2 3,090 feet, @ $1.10 per foot	3,399 00
	Total amount due	$20,912 48

To the above named defendant:

Take notice that the plaintiffs in the above styled cause will rely on proof of the foregoing items on the trial of said cause, and will ask for judgment for the total amount due, with interest thereon according to law.

SWEENEY & PORTERFIELD,
By Counsel.

V. B. ARCHER,
WM. BEARD,
Attorneys for Plaintiffs.

Order Filing Plea in Abatement.

And at another day, to-wit: at a circuit court of the United States for the northern district of West Virginia, continued and held at Parkersburg, in said district, on the 15th day of June, 1903, the following order was made and entered of record, to-wit:

SWEENEY & PORTERFIELD
vs.
THE CARTER OIL COMPANY. } In Assumpsit.

This day came the defendant, by Reese Blizzard, its attorney, and presented to the court its plea in abatement, and there being no objection thereto the same is ordered to be filed.

25 *Plea in Abatement.*

(Filed June 15, 1903.)

In the Circuit Court of the United States for the Northern District of West Virginia.

SWEENEY & PORTERFIELD
vs.
THE CARTER OIL COMPANY. } No. 634. In Assumpsit.

And the defendant, by its president and under its corporate seal, comes and defends the wrongs and injury when, etc., and for plea says that before and at the commencement of said action of said Sweeney & Porterfield against it the said Francis B. Sweeney was and is a resident of the State of West Virginia, and was not, and is not a citizen and resident of the State of New York; and that the said Halbert J. Porterfield at the commencement of said action against it, was, and is a citizen and resident of the State of West Virginia, and is not and was not a citizen and resident of the State of Pennsylvania; that the defendant, The Carter Oil Company, is

a citizen and resident of the State of West Virginia. And the plaintiffs and defendant being citizens and residents of the same State, to-wit: the State of West Virginia, therefore this court has no jurisdiction to try this action.

Wherefore, it prays judgment if the court here will take cognizance of the action aforesaid.

THE CARTER OIL COMPANY,
[SEAL.] By JNO. J. CARTER, *President.*

Witness:
GEO. A. ECKBERT, *Sec'y.*

Order Overruling Motion to Dismiss.

And at another day, to-wit: on the 3d day of February, 1904, the following order was made and entered of record, to-wit:

F. B. SWEENEY, a Resident in and Citizen of the State of New York, and H. J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners as Sweeney and Porterfield,
versus
THE CARTER OIL COMPANY, a Corporation Created and Existing under and by Virtue of the Laws of the State of West Virginia and as Such Citizens Thereof.
} In Assumpsit.

This day came again the parties by their attorneys, and
26 the court having materially considered the motion made at the last term thereof, to dismiss this action for the want of jurisdiction apparent upon the face of the proceedings in this, that the plaintiffs are residents of different States seeking to sue a defendant of another State; and after argument, and the court having considered the same, it is considered and adjudged that said motion be, and the same is overruled, to which overruling and opinion of the court the defendant excepts on the record.

Order Dismissing Cause.

And at another day, to-wit: on the 15th day of February, 1904, the following order was made and entered of record, to-wit:

FRANCIS B. SWEENEY, a Resident in and Citizen of the State of New York, and Halbert J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners Doing Business under the Firm Name and Style of Sweeney & Porterfield,

vs.

CARTER OIL COMPANY, a Corporation Created, Organized, and Existing under and by Virtue of the Laws of the State of West Virginia, and as Such a Citizen Thereof.

} In Trespass on the Case. In Assumpsit.

This day came again the parties by their attorneys, and the court having reconsidered the motion heretofore made by counsel for defendant to dismiss the plaintiffs' action on the grounds of the want of jurisdiction apparent on the face of the writ and declaration, is of opinion to and doth set aside the order entered in this cause on the 3rd day of February, 1904, overruling said motion, and the court doth now sustain the motion to dismiss this action for want of jurisdiction apparent on the face of the record. It is therefore considered by the court that the plaintiffs' action be, and the same is hereby dismissed, but without prejudice to the plaintiffs to institute any action in any court in which they may conceive they have the right to prosecute said suit. It is further considered and adjudged that the defendant Carter Oil Company recover from the plaintiffs its costs by it about its defense in this suit in this behalf ex-
27 pended. And to the ruling and opinion of the court the plaintiffs by counsel ask that an exception be noted.

Judge's Certificate.

(Filed May 10, 1904.)

In the Circuit Court of the United States for the Northern District of West Virginia.

FRANCIS B. SWEENEY, a Resident in and Citizen of the State of New York, and Halbert J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners Doing Business under the Firm Name and Style of Sweeney & Porterfield,

vs.

CARTER OIL COMPANY, a Corporation Created, Organized, and Existing under and by Virtue of the Laws of the State of West Virginia, and as Such a Citizen Thereof.

Certificate as to Jurisdiction. At Law.

In this cause I hereby certify that the judgment of dismissal made in this cause on February 15th, 1904, at the present term of this court, is based solely on the ground that the record does not show that the controversy is one, in my opinion, between citizens of different States, but that it appears from the record that one of the plaintiffs, to-wit, Francis B. Sweeney, is a resident in and citizen of the State of New York, and that Halbert J. Porterfield is a resident in and citizen of the State of Pennsylvania, while the defendant is a corporation created and existing under and by virtue of the laws of the State of West Virginia, and domiciled in the northern district of West Virginia, and no other ground of jurisdiction appears from the record; and the case is dismissed only for the reason above stated, that is that the controversy is not between citizens of different States, as is required by the Federal statutes to confer jurisdiction on this court, but one of the plaintiffs being a citizen of one State, to-wit, the State of New York, and the other plaintiff being a citizen of the State of Pennsylvania, cannot, in my judgment, be joined as plaintiffs and sue in this court, a defendant residing in the northern district of West Virginia, and consequently the proper citizen-
28 ship of different States does not exist, and that the circuit court of the United States for the northern district of West Virginia has no jurisdiction.

This certificate is made conformably to the act of Congress, of March 3, 1891, chapter 517, and is made a part of the record, and will be certified and sent up with the record of this case.

Dated this 10th day of May, 1904.

J. J. JACKSON,

District Judge, Holding the Circuit Court of the United States for the Northern District of West Virginia.

Petition for Writ of Error.

(Filed May 10, 1904.)

In the Circuit Court of the United States for the Northern District of West Virginia.

FRANCIS B. SWEENEY, a Cre-ident in and Citizen of the State of New York, and Halbert J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners Doing Business under the Firm Name and Style of Sweeney & Porterfield,

vs.

CARTER OIL COMPANY, a Corporation Created, Organized, and Existing under and by Virtue of the Laws of the State of West Virginia, and as Such a Citizen Thereof.

At Law. Petition for Writ of Error.

And now comes Sweeney & Porterfield, plaintiffs herein, and say: That on the 15th day of February, 1904, the circuit court above mentioned, entered a judgment herein in favor of the defendant, against these plaintiffs, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for
29 the correction of errors so complained of, and that a certificate by the judge of said circuit court may be made certifying that a question of jurisdiction, founded upon diverse citizenship, is an issue in this case under section 5, of the act of March 3rd, 1891, and that a transcript of the record, proceedings and papers in this case duly authenticated, may be sent to the Supreme Court of the United States.

V. B. ARCHER,
Attorney for Plaintiffs.

Assignment of Errors.

(Filed May 10, 1904.)

The Circuit Court of the United States for the Northern District of West Virginia.

FRANCIS B. SWEENEY, a Resident in and Citizen of the State of New York, and Halbert J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners Doing Business under the Firm Name and Style of Sweeney & Porterfield,

vs.

CARTER OIL COMPANY, a Corporation Created, Organized, and Existing under and by Virtue of the Laws of the State of West Virginia, and as Such a Citizen Thereof.

} Assignment of Errors.

The plaintiffs in this action, in connection with their petition for writ of error, make the following assignment of errors, which they aver exist:

First. The court erred in sustaining the motion of the defendant to dismiss the plaintiffs' suit.

Second. The court erred in dismissing plaintiffs' suit.

Third. The court erred in conceiving that it was without jurisdiction or power to entertain the suit.

Wherefore the plaintiffs pray that said judgment may be reversed.

V. B. ARCHER,
Attorney for Plaintiffs.

30 *Bond on Writ of Error.*

(Filed May 10, 1904.)

Know all men by these presents, that we, William Beard, as principal, and V. B. Archer, as surety, are held and firmly bound unto Carter Oil Company in the full and just sum of two hundred and fifty dollars, to be paid to the said Carter Oil Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of May, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a circuit court of the United States for the northern district of West Virginia, in a suit depending in said court, between Francis B. Sweeney and Halbert J. Porterfield, partners as Sweeney & Porterfield, plaintiffs, and Carter Oil Company, a corporation, defendant, a judgment was rendered against the said Sweeney & Porterfield, plaintiffs, and the said Sweeney & Porterfield, plaintiffs, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Carter Oil Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 9th day of June, 1904.

Now, the condition of the above obligation is such, that if the said Sweeney & Porterfield, plaintiffs, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. BEARD. [SEAL.]
V. B. ARCHER. [SEAL.]

Sealed and deliveder in presence of—

——— ———.

Approved by—
J. J. JACKSON,
Judge D. C. U. S., N. D. W. Va.

May 10, 1904.

31 *Order Allowing Writ of Error.*

And at another day, to-wit: on the 10th day of May, 1904, the following order was made and entered of record, to-wit:

FRANCIS B. SWEENEY, a Resident in and Citizen of the State of New York, and Halbert J. Porterfield, a Resident in and Citizen of the State of Pennsylvania, Partners Doing Business under the Firm Name and Style of Sweeney & Porterfield,
vs.
CARTER OIL COMPANY, a Corporation Created, Organized, and Existing under and by Virtue of the Laws of the State of West Virginia, and as Such a Citizen Thereof.

Order Allowing Writ of Error. At Law.

This 10th day of May, 1904, come the plaintiffs by their attorney, and file herein and present to the court their petition, praying for the allowance of a writ of error, and an assignment of errors in-

tended to be urged by them, to a certain judgment rendered in this cause at the present term of this court, on the 15th day of February, 1904; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the Supreme Court of the United States, and also praying for a certificate that the question of jurisdiction, founded upon diverse citizenship, is an issue in this case under section 5 of the act of March 3rd, 1891; and praying further that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, and doth make the certificate aforesaid, which said petition, assignment of errors and certificate are here made a part of the record in this case. But the writ of error is allowed upon the plaintiffs, or some one for them, giving bond according to law, with surety to be approved by the court, in the sum of two hundred and fifty (250) dollars, which shall operate as a supersedeas bond.

And thereupon the plaintiffs, by their attorney, V. B. Archer, tendered to the court a bond in the penalty of two hundred and fifty (250) dollars, with William Beard as principal and V. B.
32 Archer as surety, for the said Sweeney & Porterfield, in conformity with the requirements of this order, and which bond is approved.

Citation.

33 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Francis B. Sweeney and Halbert J. Porterfield, partners as Sweeney & Porterfield, plaintiffs, and Carter Oil Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Sweeney & Porterfield, plaintiffs, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the ninth day of June, next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 10th day of May, in the year of our Lord one thousand nine hundred and four.

{Seal Circuit Court United States, Northern District West Virginia, Parkersburg, West Va.}

L. B. DELLICKER,
Clerk of the Circuit Court of the United States.

Allowed by

J. J. JACKSON,
Judge D. C. U. S., D. W. V.

May 10th, 1904.

[Endorsed:] In the circuit court, U. S., northern dist. W. Va. Filed May 10 1904 at Parkersburg, W. Va. L. B. Dellicker, clerk.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Carter Oil Company, a corporation created, organized, and existing under and by virtue of the laws of the State of West Virginia and, as such, a citizen thereof, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 9th day of June, 1904, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of West Virginia, wherein Francis B. Sweeney, a citizen of and resident in the State of New York, and Halbert J. Porterfield, a citizen of and resident in the State of Pennsylvania, partners doing business under the firm name and style of Sweeney & Porterfield, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of May, in the year of our Lord one thousand nine hundred and four.

{Seal Circuit Court United States, Northern District West Virginia, Parkersburg, West Va.}

J. J. JACKSON,
Judge D. C. U. S., D. W. V.

34½ [Endorsed:] In the circuit court, U. S., northern dist. W. Va. Filed May 10 1904 at Parkersburg, W. Va. L. B. Dellicker, clerk.

Service of the within citation is hereby accepted for Carter Oil Company.

REESE BLIZZARD, *Att'y.*

35 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Northern District of West Virginia, } *ss:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the northern district of West Virginia, hereby certify that the foregoing is a true and complete transcript of so much of the record and proceedings of said court, in the case of Sweeney & Porterfield *v.* Carter Oil Company, as was requested by the attorney for the plaintiff in error, as the same appears on file and among the records of my said office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at Parkersburg, in said district, this 13th day of May, A. D. 1904.

{ Seal Circuit Court United States, Northern District West Virginia, Parkersburg, West Va. }

L. B. DELLICKER,
Clerk C. C. U. S., N. D. W. Va.

Endorsed on cover: File No. 19,365. N. West Virginia C. C. U. S. Term No. 267. Francis B. Sweeney and Halbert J. Porterfield, partners as Sweeney & Porterfield, plaintiffs in error, *vs.* Carter Oil Company. Filed May 20", 1904. File No. 19,365.

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 8 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ~~287~~. 32.

FRANCIS B. SWEENEY AND HALBERT J. PORTERFIELD, PARTNERS AS SWEENEY & PORTERFIELD, PLAINTIFFS IN ERROR,

vs.

CARTER OIL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

BRIEF AND ARGUMENT
OF V. B. ARCHER AND W. S. CHESLEY, ATTORNEYS FOR PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 267.

FRANCIS B. SWEENEY AND HALBERT J. PORTERFIELD, PARTNERS AS SWEENEY & PORTERFIELD, PLAINTIFFS IN ERROR,

vs.

CARTER OIL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

BRIEF AND ARGUMENT
OF V. B. ARCHER AND W. S. CHESLEY, ATTORNEYS FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This writ of error is to the judgment of the Circuit Court of the United States for Northern District of West Virginia, dismissing the plaintiff's action upon the grounds that the Circuit Court had not jurisdiction by reason of the fact that one of the plaintiffs was a citizen of and a resident in the State of New York, and the other plaintiff was a citizen of and a resident in the State of Pennsylvania, and for this reason alone the case was dismissed.

The cause is here upon the certificate of the Judge of the District Court who was as such, presiding at the term of the Cir-

cuit Court when the order of dismissal was entered to-wit, February 15, 1904.

The suit was brought by the plaintiffs of the citizenship as stated above, against a corporation created and existing under the laws of the State of West Virginia, with domicile in the Northern District thereof, upon a money demand to-wit, $20,000.00.

The defendant made a motion to dismiss the suit for want of jurisdiction, apparent upon the face of the writ, and declaration, and this motion was sustained and suit dismissed. (See order, Record 23.)

The Judge certified the case here. (See certificate Record 24.)

The sole question, therefore, here is, had the Circuit Court jurisdiction, under the Act March 3, 1891, C. 517, Section 4–6?

ARGUMENT.

The material provisions of the Federal Statutes conferring jurisdiction upon the Circuit Courts, necessary to be considered here, are as follows:

" * * * * * * That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, * * * * * * or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, * * * * * * and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * * "

(Supplement to Revised Statutes U. S., Vol. 1, 2nd Ed. 611.)

(U. S. Compiled Statutes, 1901, Vol. 1, 508.

While no construction of the statute involving the jurisdiction of the Circuit Court, of causes where there are more than one plaintiff, and where such plaintiffs are citizens of different states, seems to have been made by this Court, there are

cases where the right to sue defendants who are citizens of different states has been determined.

(Smith v. Lyon, 133 U. S. 315.)

This decision, however, does not construe the statute upon the question where there are two or more plaintiffs, citizens of different states, suing a defendant in a Circuit Court of a District, where such defendant has his citizenship and residence.

In order to affirm the judgment of the Circuit Court in case at bar it will be incumbent upon this Court to construe the language of the statute; "Controversy between citizens of different states" to mean "Controversy between citizens of the same State, and citizens of another State."

The only paragraph of the U. S. Statutes authorizing such construction is sub-division four of section 2, Act March 3, 1901, which we quote:

"And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in said State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause:"

(Supplement Rev. Statutes, Vol. 1, 612.)

This is a special provision, relating wholly to local prejudice and is the only provision of the Act where the right of removal is limited to controversies between "citizens of a State" or "citizen of the State in which suit is brought."

This provision of the Statute is not applicable to case at bar, although the same construction was given by the Circuit Court to Section 1, as has been given by some of the lower courts to sub-division four of Section 2.

We most respectfully submit that in case at bar, where either plaintiff possessed the necessary citizenship to give the Circuit Court jurisdiction of an action against the defendant, that by uniting, they had the same right to maintain their action.

We insist:

That (A), The plaintiffs are citizens of different states from the defendant:

That (B), They have sued the defendant in the District in which it is a resident.

And therefore, the Circuit Court had jurisdiction.

The Constitution of the United States, Article III, Section 11, provides that the "Judicial power shall extend * * * * to controversies * * * between a State and citizens of another State:—between citizens of different States:—between citizens of the same State, claiming lands under grants of different states, and between a State or citizen thereof, and between States, citizens and subjects."

This is a controversy "between citizens of different states."

The jurisdiction of the Circuit Court therefore, must necessarily exist. Congress has limited the right to invoke the jurisdiction by original process, to the Circuit Court for the District in which either the plaintiff or the defendant resides. The plaintiffs have brought themselves within this provision of the Statute. They have sued the defendant in the district of which it is a resident. Neither the Constitution nor the Statute provides that the plaintiffs must be citizens of "a State" or of "the same State," in a case where the jurisdiction is invoked solely upon the grounds of divers citizenship, and the courts, we submit, cannot limit the constitutional right of citizens of different states upon a joint cause of action, to resort to the United States Circuit Courts for relief in cases such as is presented here.

The first and second paragraphs of the statute, which we have quoted, relate exclusively to jurisdiction; that is, the jurisdiction must be between citizens of different states. The latter part of section 1, relates exclusively to the manner in which this jurisdiction is called into being, and which provides that a suit can only be brought upon original process against a defendant in a district wherein he resides or in the district where the plaintiff resides.

Sweeney & Porterfield institute this suit against the Carter Oil Company in the Northern District of West Virginia, in which District the said defendant is found, and wherein it is a

citizen of the State of West Virginia. The sole question, therefore, presented by the motion, is whether the statute requires all the plaintiffs in an action to be citizens of the same State, and we maintain that no such construction has ever been put upon this statute by any Federal Court, except the court which decided this case.

Probably the earliest decision upon the question is Strawbridge v. Curtiss, 3 Cranch, 267. The syllabus of the case is as follows:

"Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in the courts of the United States, to sustain the jurisdiction. Where the interest is not joint, the court gives no opinion."

Chief Justice Marshall in delivering the opinion in this case, says:

"The words of the act of congress are 'where an alien is a party; or the suit is between a citizen of a State where the suit is brought, and a citizen of another State.'

The Court understands these evpressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued in those courts."

The statement of the facts in case above conclusively shows that the court had not jurisdiction, but the syllabus of the case applied to the case at bar, will show that the law laid down by Chief Justice Marshall fully sustains the jurisdiction of the Circuit Court in this action.

In Strawbridge v. Curtiss some of the complainants were alleged to be citizens of the State of Massachusetts. The defendants were also stated to be citizens of the same state, except Curtiss, who was averred to be a citizen of the State of Vermont, and upon whom the writ was served in that State. We take it that the case embraced joint demands, the same as that in case at bar. In case at bar the action is joint, being a partnership demand against the defendant. The defendant can alone be sued in the federal court in the Northern District of West Virginia, where it had its domicile. The defendant,

therefore could sue both of the plaintiffs in the Circuit Court for the Northern District of West Virginia, provided they each were found therein, but as to the service of process, under the latter clause of the Act of 1891, above quoted, in order to bring the defendants, if the Carter Oil Company were suing Sweeney & Porterfield, bebore the Court, they must be served with process within the Northern District of West Virginia, and if they were found therein an there served with process the court would have complete jurisdiction. There is, therefore, a mutual right of action in this court.

The law as to the jurisdiction of courts in cases of divers citizenship, will be found also in the removal cases, for the reason that under sub-division 2 of section 629 of the Revised Statues, or, more properly speaking, under section 2, of the Act of 1891, concerning jurisdiction of the Federal courts, a case is only removable where the federal court, to which the case is proposed to be removed, is given original jurisdiction as prescribed by the first section of that Act. Therefore, if Sweeney & Porterfield had been sued in the State Court of West Virginia, they could have united in a joint petition, and would have been entitled to remove this cause to the Circuit Court.

The first point of the syllabus in the removal cases, 100 U. S., 457, is as follows:

"The provision in the first clause of of the second section of the act entitled "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875, (18 Stat., part 3, 470), 'that any suit of a civil nature, at law or in equity, now pending * * * * * in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * * in which there shall be a controversy between citizens of different States, * * * * either party may remove said suit into the Circuit Court of the United States for the proper district', construed, and held to mean that when the controversy about which a suit in the State Court is brought is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit the Circuit Court without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal, the matter in dispute may be ascertained, and according to the facts

the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed."

In Young vs. Parker, 132 U. S., 267, the second point of the syllabus is as follows:

"In order to the removal of a cause from a state court on the ground of local prejudice, under Rev. Stat. §639, it is essential, where there are several plaintiffs or several defendants, that all the necessary parties on one side be citizens of the State where the suit is brought, and all on the other side be citizens of another state or other States; and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed."

It will be noticed that the language as to the citizenship used in this case, (and the same language is used in all cases,) is that "all the parties on the other side be citizens of another State or States." This case went up from the District of West Virginia. The Chief Justice in his opinion, pages 270, 271, uses the following language:

"The provisions of that act are reproduced in the third subdivision of section 639 of the Revised Statutes, and it was and is essential, in order to such removal, where there are several plaintiffs or several defendants, that all the necessary parties on one side must be citizens of the State where the suit is brought, and all on the other side must be citizens of another State or States, and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed."

The main question here is that each of the plaintiffs is and must necessarily be a citizen of a different State from the defendant. There is but one defendant. If there was another defendant, and that other were a citizen of New York or Pennsylvania, the jurisdiction would not exist.

In Ballin vs. Lehr, 24 Fed. Rep. 193, one of the plaintiffs was a citizen of New York, the other of New Jersey. One of the defendants was a citizen of Maryland, and the other a subject of Prussia. The suit was instituted in the Southern District of New York. The court held that each person on one side was a citizen of a State, and each person on the other a citizen of another State or Country, and as to the statute Judge Wheeler says: "The statute uses the plural number only, but this in-

cludes the singular, and does not imply that there must be more than one citizen of the same State on one side of every controversy to make the suit removable.

In Pitkin County Min. Co. vs. Markell, 33 Fed. Rep. Page 386, the syllabus is as follows:

"Act of congress of March 3, 1887, § 1, provides that no civil suit shall be brought in the United States Courts against any person 'in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant.' Section 2 adopts this limitation as defining the cases which may be removed. Plaintiff, a resident corporation of Colorado, sued defendants, one of whom was a citizen of Minnesota and one of Wisconsin, in a Colorado court, and defendants removed the case to the United States court, for the District of Colorado. Held, that it was properly removed, as coming under the provisions of the second clause of section 1 of the above act."

This, also, is a case exactly in point. In this case the Colorado corporation sued, in the District of Colorado, a citizen of Minnesota and a citizen of Wisconsin, in the Colorado courts. The defendants removed. The court held that the court had jurisdiction, that it was a case properly removable. The reasoning of Judge Hallett at page 387 of the last case cited, seems to be conclusive of the question. We quote:

"Standing alone, that part of this clause which declares that "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,' would afford strong support to the plaintiff's position. But it does not stand alone; it is modified by the words following it, 'where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' And, so modified, the law is that a suit may be brought in the district where the plaintiff resides whenever the defendant can be found therein, even when the defendant is not an inhabitant of such district. That this is the proper construction of the act is clearly shown by the debate in the senate on March 3, 1887, which will be found in volume 18 of the Congressional Record, p. 2724, as follows:"

"Mr. Mitchell, of Oregon. I should like to know from the

judiciary committee, or the senator having the bill in charge, if it does not change the law where a suit is brought by a citizen of one state against a citizen of another state, when the federal jurisdiction arises solely out of that fact, so that a suit may be brought in either the district where the plaintiff resides or the defendant resides? Is there not a radical change in the law in that respect?

MR. WILSON, of Iowa. No: I do not think there is a radical change.

MR. MITCHELL, of Oregon. Does not the first section, if it should become a law, enable a person residing in New York, for instance, to sue a person residing in the State of Oregon, for instance, by bringing a suit in the state of New York?

MR. EDMUNDS. No; quite the reverse. He could only sue in Oregon.

MR. MITCHELL, of Oregon. I do not understand it that way. What does this mean? "But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." What I wish to call attention to, is what follows: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or defendant." What does that mean if it does not enable a person residing in the state of New York to sue a citizen of the state of Oregon in the district of New York, when the jurisdiction arises solely because of the fact that the suit is between citizens of different states?

MR. WILSON, of Iowa. I do not think that is a change of the section of the law that this bill proposes to modify.

MR. MITCHELL, of Oregon. Does the senator mean to say that that is the law now?

MR. WILSON, of Iowa. That is the law now.

MR. MITCHELL, of Oregon. The act which the pending bill proposes to amend, the act of March 3, 1875, in the first section, speaking of jurisdiction, provides as follows: "But no person shall be arrested in one district for trial in another in any civil action before a circuit court or district court; and no civil suit shall be brought before either of said courts (that is, before the circuit or the district court) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings." That being the existing law, as I understand it,

when a person wishes to sue as inhabitant of the State of California, he must go into that State, and bring his suit there, unless he happens to find the person he wishes to sue in some other district, and then he may sue there. Now, it is proposed to change that, as I understand.

MR. HOAR. In the first place, the existing law allows a suit to be brought in the United State Court between citizens of different states for amounts exceeding $500.00. That is put up to $2,000. In the next place, it allows a plaintiff to sue a defendant, a citizen of another state, wherever he catches him all over the United States. That is the existing law; but the proposed change in the law is that he can only sue him, they being citizens of different states, either in the defendant's state, or, if the defendant happens to be in the district of the plaintiff's home, then in the plaintiff's district. So, instead of the sixty or seventy Districts which, by the existing law, the plaintiff can sue him in, there are only two left. Suppose the defendant goes to the plaintiff's home, and is found there—a man doing business there: the plaintiff can sue him in the state court, and the defendant can take him to the United States court. It is certainly reasonable that the plaintiff should be permitted, in the first instance, to take him to the United States court.

MR. MITCHELL, of Oregon. My friend then understands this this section to mean that if the plaintiff, for instance, lives in the state of New York, and the defendant lives in the state of California, then the plaintiff may either go to California and sue there, or if he happens to find him in the state of New York, he may sue him there; but he can not sue him anywhere else.

MR. HOAR. That is it, exactly; and in the state of New York, without this proposed statute, he can take him into the New York state courts, and the defendant then can remove the cause to the United States court.

MR. MITCHELL, of Oregon. I have no objection, if that is the construction; but it seems to me that this latter part of the clause enables a plaintiff to bring suit in the district where the defendant does not reside, and where he is never found.

MR. HOAR. In all the districts where both parties reside in the same state, the state court is presumed to have jurisdiction between the parties.

MR. MITCHELL, of Oregon. Then the senator holds that, where the United States jurisdiction attaches only on the fact that the action is between citizens of different states, the suit shall be brought only in the district of the residence of either the plaintiff or defendant, qualified by what is herein provided.

MR. WILSON, of Iowa. Undoubtedly.

MR. MITCHELL, of Oregon. If that is the construction, I think it is a strained construction.

MR. WILSON, of Iowa. Instead of widening the present provision in regard to the bringing of suits out of the district of the residence of either party, it contracts it, and requires all suits to be brought either in the district of the plaintiff's or of the defendant's residence where he may go.

MR. EDMUNDS. Just what the law of nearly every state is."

This being therefore a suit against the defendant where it has its residence, this fact controls, as to the method of bringing into effect and making effective, the jurisdiction of the federal court. First, we have complete jurisdiction as to the divers citizenship. Second, the statute only permits this jurisdiction to be invoked in the court where either the plaintiff or the defendant resides. Plaintiffs, having elected, therefore, to bring this suit in the Circuit Court of the District where the defendant resides, process can be legally served and the court has complete jurisdiction under the divers citizenship clause of the statute. The converse of this proposition would not be good, that is, the converse so far as going to New York or Pennsylvania and bringing the suit is concerned. The defendant here, to assert its rights either in New York or Pennsylvania, would be met at once by the prohibition of this federal statute as to bringing the suit in the district of the residence of the defendant, and it is inhibited from bringing the suit in either Pennsylvania or New York because there would be more than one defendant, and jurisdiction could only be acquired by process against one of the defendants.

For a case on the proposition that the defendant, the Carter Oil Company, could sue the plaintiffs, were they found in the district of West Virginia, we cite Roberts v. Ry. Co., 104 Fed. 577. The first point of the syllabus is as follows:

"In a suit by a plaintiff, who is a citizen of the state where it is brought against two defendants, the fact that one of the defendants is a citizen of a different state, and the other an alien, does not deprive a federal court of jurisdiction, or prevent a removal of the suit from a state court, where either defendant would have a right to remove it if sued alone, and when they unite in petitioning for removal."

Judge Hanford's reasoning upon this case is worthy of par-

ticular consideration. We quote a portion of this opinion from page 579:

"To bring a case in which there is more than one plaintiff or defendant within the jurisdiction of a United States circuit court on the ground of diversity of citizenship of the parties, 'each distinct interest should be represented by persons all of whom are entitled to sue, or may be sued, in the federal court; that is, that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.' In ex parte Girard, Fed. Cas. No. 5, 457, Mr. Justice Grier, in discussing the question in that case as to the right of removal, restated the rule enunciated by Marshall, and adapted it to removable causes in the following words:

'Where there is more than one person, plaintiff or defendant, each must be competent to sue in the courts of the United States The right to remove must exist in each and all the persons suing, and against whom the opposite party may demand a decree or judgment.'

"Within the letter and spirit of this rule, the right of the defendants to remove this cause into this court, is clear."

The error which the court below committed, arose from confusing the jurisdictional clause with the clause fixing the court in which such jurisdiction alone can be exercised. The two propositions are distinct. The jurisdiction may be complete, yet a plaintiff may be wholly unable to invoke the aid of a federal court, for the reason that he cannot obtain service of process by reason that the defendants may not be inhabitants of the districts, nor found therein.

The general rule on this question is laid down in 18 Enc. of Pl. & Pr. 193, as follows:

"Under every Act of Congress for the removal of causes on the sole ground of diverse citizenship it has uniformly been held that where there is a plurality of plaintiffs or of defendants every necessary party upon one side of the controversy must be a citizen of a different state from every necessary party upon the other."

We also quote from page 195:

"The difference of citizenship must exist between the plaintiffs on the one hand and the defendants on the other; diversity of citizenship as to those between whom the controversy exists is alone regarded."

Practically all the authorities seem to be cited under the first quotation, in notes. The text is fully sustained by the cases cited in notes and to apply the rule to the case at bar; where there are a number of plaintiffs, each plaintiff must be in a position to assert his right as to citizenship, that is, divers citizenship must exist between the defendant and each of the several plaintiffs, and each plaintiff must be qualified to sue or liable to be sued in the federal court. There is no question of a severable or separable controversy here. The claim is not severable. It is a joint demand, a partnership demand. The partners each have the requisite citizenship as to asserting a claim against the defendant, Carter Oil Company, each plaintiff can be sued in the Federal Courts. The Carter Oil Company alone is sued. It is a defendant, a resident and citizen of the Northern District of West Virginia. What reason is there to construe the federal statute, which confers jurisdiction generally upon the circuit courts, to cases where there is a controversy between citizens of different states, to mean that each of the plaintiffs must be a citizen of one state, where the jurisdiction, under the statute, is fully sustained by reason of the plaintiffs each being residents and citizens of states different from that of the residence and citizenship of the defendant. No such rule has been laid down by any of the courts, nor can such construction be placed upon the federal statutes. The object of the statute is to confer upon federal circuit courts jurisdiction of controversies between citizens of different states.

The construction given by the Circuit Court to the clause of the Statute providing that suit shall be brought only in the district of the residence of the plaintiff or defendant, would seem to be that in all cases there must be a mutual right of action. In other words that because the Carter Oil Company could not sue Sweeney & Porterfield in the Circuit Court of New York or Pennsylvania, as held in Smyth v. Lyon, that therefore Sweeney & Porterfield cannot sue the Carter Oil Company in the United States Circuit Court for the Northern District of West Virginia.

But even this construction would not be warranted, as the Carter Oil Company could sue Sweeney & Porterfield in the Circuit Court of the United States for the Northern District of West Virginia, provided they were found in such district.

But we submit that the statute cannot be reasonably construed to require a mutual right of action.

The only necessary condition required, as we understand the adjudged cases, is that the parties must be such as are capable or liable to be sued in a federal court. That is, for instance, they must not be citizens of the District of Columbia or of one of the Territories.

The qualification is as to the right to resort to the Federal courts, or the liability to be impleaded therein, and not the right or liability to sue or be sued in any particular Circuit Court; this determines the question.

In case at bar each of the plaintiffs is a citizen of a State, and as such can sue or be sued in a Federal Circuit Court, and this, we submit, is all that is required, as to any reciprocal right or liability as to being sued by the Carter Oil Company.

The question of serving process must always be contra-distinguished from the question of jurisdiction. The court had complete jurisdiction of the action here, and a right of action can be asserted, first, by the plaintiffs bringing suit against the defendant, because jurisdiction is conferred by statute and process can be served; second, the plaintiffs could be sued by the defendant in this district, because the defendant is a resident thereof, provided the defendants can be found therein in order to bring them before the court by a proper process.

In Foster's Federal Practice, 3 Ed., Vol. 1, pages 76 and 77, the law upon this question is laid down as follows:

"But where it depends upon citizenship (referring to jurisdiction) in different states, the suit may be brought in the district in which either the plaintiff or the defendant resides, provided the defendant can be duly served."

In case at bar the plaintiffs could not serve the defendant in Pennsylvania or New York. They can alone serve process on the defendant in West Virginia, while the defendant if it finds the plaintiffs in this district, could cause original process to be served upon them within the district, and there jurisdiction could be acquired.

In Smith v. Lyon, 133 U. S., 315, the Supreme Court of the United States denied jurisdiction in an action where three parties were endeavoring to litigate, and two plaintiffs joined in an

action and sued a defendant in the jurisdiction of one of the plaintiffs. The plaintiffs, being residents of different states, could not sue the defendant in either of these states, but the plaintiffs could have sued the defendant Lyon, in the State of Texas had they gone there. It seems to me that the reasoning of Justice Miller in this case is conclusive of this question. At page 317, in discussing this question, Justice Miller uses the following language:

"In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the state of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provisions, in terms, for the case of two defendants or two plaintiffs who are citizens of different states. In the present case, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite, in one suit in a state of which either of them is a citizen."

Suppose, however, the plaintiffs residing in Missouri and Arkansas had sued the defendant in the Circuit Court of the United States for the District of his residence, in his own state of Texas. Would not this court have held that such court had jurisdiction?

In Hooe v. Jamieson, 166 U. S. 395, Chief Justice Fuller reviews the decisions down to the Act of March 3rd, 1891. In this case a citizen of a state was joined as co-plaintiff with a citizen of the District of Columbia, but the court held that, following the earlier decisions, the word "state" as used in the original judiciary Act, did not confer jurisdiction on the federal courts so as to allow a citizen of a district to invoke that jurisdiction. But the opinion in this case reviews the earlier cases at length, and from that decision it will plainly appear that the contention which we insist upon here is the only correct one, that is, that the plaintiffs may be citizens of different states, but

where they invoke the jurisdiction of the court they must sue where the defendants all reside, or if in the state of the plaintiff, they must find all the defendants therein, in order to confer jurisdiction.

The difficulty in question only arises in cases where there are joint defendants.

Referring to the statute of 1891, we find this statement fully born out. The Act provides first, for the general jurisdiction, and second, the manner in which this jurisdiction can be invoked; that is, in a civil suit the same shall be brought only in the district where the defendant is an inhabitant, but where the sole ground of jurisdiction rests on citizenship, the suit may be brought in the district of the residence of the plaintiff or the residence of the defendant. The plaintiffs sue, therefore, regardless of the diversity of their citizenships, in the district wherein the defendant resides.

Or, if the plaintiffs all reside in one district, then they may sue, if they can obtain jurisdiction by service of process in the residence district of the plaintiff, all the defendants, regardless of the citizenship of such defendants. The restriction, it will be noted, is as to the obtaining legal service of process upon the defendants. The statute alone is sufficient to fully justify the position here assumed.

In Davis v. County Court of Randolph County, 88 Fed. 705, Judge Jackson says, in his opinion at page 706: "It is very clear that, unless all the parties on one side of the controversy are citizens of different states from those on the other side, * * * * the case cannot be removed."

In Jellenik v. Huron Copper Mining Co., 177 U. S., 1, a suit was brought in the Circuit Court of the United States for the Western District of Michigan, by parties citizens of other states than Michigan, against a Michigan mining corporation and certain individual defendants holding shares of stock in that corporation, and being citizens residing in Massachusetts. Held, that the court had jurisdiction.

It is due to say that in this respect the bringing the parties defendant before the court was under the special provision of the federal statutes, where publication can be taken in cases to

remove cloud on title to personal or real property, but so far as the question at issue here is concerned, the Supreme Court in that case have held conclusively that the divers citizenship of the plaintiffs is sufficient to give jurisdiction where they may be citizens of different states.

In Peninsular Iron Company v. Stone, 121 U. S. 631, the syllabus is as follows:

"The rights of each and all of the parties in this case being separate and distinct, but depending on one contract, they elected to join in enforcing the common obligation; and as one citizen of Ohio is a necessary party on one side, and another citizen of that state a necessary party on the other, with interests so conflicting that the relief prayed for cannot be had without keeping them opposed, the cause is remanded (with costs against the appellants in this court) to the Circuit Court with directions to dismiss it for want of jurisdiction."

This is a leading case upon the question of jurisdiction, and reference in the opinion is made to many of the earlier cases, and the court raises no question as to the right of plaintiffs who are citizens of different states to institute a proceeding against a defendant in another state. The only question considered as to the want of proper parties in that case, was that one of the defendants was a citizen of the same state with some of the plaintiffs.

In Merchants Cotton Press Co. v. Insurance Co., 151 U. S. 368, the jurisdiction on account of the fact that the plaintiffs were citizens of various states, was considered no bar to the action, but the court held that where a part of the plaintiffs were aliens and two of the defendants were aliens, that for this reason the court would not have jurisdiction.

The text of a recent work entitled "Jurisdiction of Federal Courts," by Carter, at page 120, is as follows:

"The principal is well settled that in a suit in a Federal Court where the jurisdiction is founded upon the fact that the parties are citizens of different states, and there is a plurality of parties plaintiff, or defendant, the requisite diversity of citizenship must exist between all of the parties on one side, and all of those upon the other."

After this text the author reviews Strawbridge v. Curtiss, Coal Co. v. Blatchford, New Orleans v. Winter, in all of which

cases the only question raised and decided was that each plaintiff must have the right to sue each defendant in the Federal Court, and that is the condition here. Each of the plaintiffs would have a right to sue the defendant in the United States Circuit Court for the Northern District of West Virginia. Therefore, the jurisdiction is complete.

In McCormick v. Walthers, 133 U. S., 41, syllabus is as follows:

"When the jurisdiction of a Circuit Court of the United States is founded upon any of the causes specially mentioned in section 1, of the Act of March 3, 1887, as amended by the Act of August 13, 1888, 25 Stat. 433, c. 866, (except the citizenship of the parties) the action must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides."

In Coal Company v. Blatchford, 11 Wall. 172, Justice Field, delivering the opinion at pages 175–6, says:

"These authorities are conclusive of the present case. The defendant is a corporation created under the laws of Pennsylvania. One of the plaintiffs, Blatchford, describes himsel in the bill as a citizen of the State of New York, and the plaintiff Newman describes himself as a citizen of Pennsylvania, and they both describe themselves as trustees, who sue solely for the use of Henry Beckett, an alien and a subject of the Queen of Great Britain, and of Joseph Loyd, a citizen of New Jersey. The demurrer of the defendant raises the objection that the plaintiff Newman is a citizen of the same State with the defendant, and that the court has in consequence no jurisdiction of the case. If there were no other parties, the suit clearly would not lie, for the eleventh section of the Judiciary Act only authorizes a suit between citizens of different states, not between citizens of the same State. And the objection, according to the construction we give to that section and to the authorities cited, is equally available when a disqualified party is joined with others who are qualified."

From this statement of the law, we understand that citizens of New Jersey and an alien, a subject of the Queen of Great Britain, could unite in a suit as plaintiffs, in the Circuit Court of the United States for Western District of Pennsylvania,

against a defendant, resident of said district. But as the suit was brought in the name of the Trustees, one of whom was a citizen and resident of Pennsylvania, jurisdiction was denied.

We therefore, respectfully submit that the Circuit Court had jurisdiction of the cause, and that the judgment complained of, should be reversed.

V. B. ARCHER,
W. S. CHESLEY,
Attorneys for Plaintiff in Error.

FILE COPY.

Supreme Court of the United States.

October Term, 1904.

No. ~~264~~ 32.

Office Supreme Court U. S.
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Clerk.

FRANCIS B. SWEENEY AND HALBERT J. PORTERFIELD, PARTNERS AS SWEENEY AND PORTERFIELD, PLAINTIFFS IN ERROR.

Versus

CARTER OIL COMPANY, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEO. L. ROBERTS,
REESE BLIZZARD,
CHAS. GIBBS CARTER,
Attorneys for Defendant in Error.

Supreme Court of the United States.

October Term, 1904.

No. 267.

FRANCIS B. SWEENEY AND HALBERT J. PORTERFIELD, PARTNERS AS SWEENEY AND PORTERFIELD, Plaintiffs in Error.

Versus

CARTER OIL COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

Brief and Argument for Defendant in Error.

Statement of Facts.

This is an action of trespass on the case in assumpsit, instituted in the Circuit Court of the United States for the Northern District of West Virginia.

The writ was issued on the 17th day of April, 1903, and, therefore, long since the state of West Virginia was divided into two Federal judicial districts, known as the Northern and Southern Districts.

At May Rules, 1903, the declaration and bill of particulars were filed.

Shortly after this the defendant in error, by its counsel, appeared and made a motion "to dismiss this action for want of jurisdiction apparent upon the face of the record." The court overruled the motion to dismiss, but subsequently reconsidered its judgment and on February 15th, 1904, entered an order setting aside its former judgment and placed upon the record in the case the following order: "And the court doth now sustain the motion to dismiss this action for want of jurisdiction apparent upon the face of the record."

The ground upon which plaintiffs claimed jurisdiction in the Federal court was that of diverse citizenship.

There were four jurisdictional defects apparent upon the face of the record and which were included in the motion to dismiss.

First. It is not charged in the declaration that the amount in controversy, exclusive of interest and costs, exceeds the sum of Two Thousand Dollars.

Second. The suit is instituted in the Northern District of West Virginia and it is not charged in the declaration, nor is it apparent from the record, that the defendant is a resident or inhabitant of the Northern District of West Virginia.

Third. It appears upon the face of the declaration that the plaintiffs are partners but where the partnership is domiciled does not appear, and it appears that, as individuals, one of the plaintiffs was a citi-

zen of the State of New York and the other was a citizen of the State of Pennsylvania, and as such they are suing the defendant as a citizen of the State of West Virginia.

Fourth. The citizenship of both the plaintiffs and defendant is not charged by direct positive averment, but only by way of recital and inference.

It is admitted that only the third ground of want of jurisdiction apparent upon the face of the record was argued before the court, but the argument of this necessarily includes the second proposition, and it is insisted that all four grounds were comprehended in the motion, and that each of the grounds existed, as apparent upon the face of the record.

The court, passing upon these facts, sustained the motion to dismiss the action for want of jurisdiction apparent upon the face of the record.

On May 10th, the court inadvertently certified in effect that the only question before him and upon which he based his judgment of dismissal was as to whether plaintiffs, citizens of different states, could join in an action against a citizen of still another and different state. This certificate was made without defendant or its counsel being notified of the motion for the said certificate, or that the same would be asked for, and, therefore, the court, by oversight, omitted from the certificate the first, second and fourth grounds of want of jurisdiction apparent upon the face of the record.

ARGUMENT.

The argument on the propositions stated will be made in the order in which they occur in the statement of facts.

First. It is not charged in the declaration that the amount in controversy, exclusive of interest and costs, exceeds the sum of Two Thousand Dollars.

The only ground on which a Federal court could take cognizance of this case was that of diversity of citizenship, and certainly, in order to sustain the jurisdiction of the court on this ground, it must appear that "the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars."

> Acts of Congress 1887 and 1888, as amended by Act of March 13, 1891.

A perusal of the record will disclose that there is nothing therein contained which has the faintest semblance of an allegation complying with this jurisdictional requirement. It is true that the declaration states a sum of money claimed to be due the plaintiffs from the defendant which would exceed two thousand dollars, but it is not stated that this is exclusive of interest and costs. The court cannot presume that the interest and costs, if deducted, would still leave a sum of two thousand dollars. In addition a direct and affirmative allegation that the amount in controversy, exclusive of interest and costs, exceeds two thousand dollars, is required, and no allegation which does not, at least, in substance, comply with this jurisdictional feature will be sufficient.

Second. The suit is instituted in the Northern District of West Virginia and it is not charged in the declaration, nor is it apparent from the record, that the defendant is a resident or inhabitant of the Northern District of West Virginia.

The state of West Virginia was divided into two judicial districts, the northern and the southern, by the Act of Congress of January 22nd, 1901, Chapter 105, Section 2, and the court will take judicial notice of this division and that it was in effect upon the day that this suit was instituted, and that, therefore, such suit should and must be instituted in the judicial district of which the defendant was a resident. There is no allegation whatever in the declaration that the suit was instituted in the district of which the defendant was a resident. The record is totally destitute of any intimation as to which of the two districts in West Virginia the defendant is a resident.

> "And no civil suit shall be brought before either of "said courts against any person by any original process "or proceeding in any other district than that whereof "he is an inhabitant, but where the jurisdiction is "founded only on the fact that the action is between "citizens of different states suits shall be brought only "in the district of the residence of either the plaintiff "or the defendant."
>
> Act of March 3, 1887, Chap. 373, Section 1.
> Act of August 13, 1888, Chap. 866, Section 1.
> Act of March 3, 1891, Chap. 517, Section 4-6.

The statement in the declaration in relation to the citizenship of the defendant is that it is a citizen of the State of West Virginia and that it is a corporation, but there is no statement as to where its principal office is located or of which of the districts of said state it is a citizen. Under

the Acts just cited the defendant in error contends that this is a fatal omission to the maintenance of this suit.

"The principal ground of demurrer insisted upon by "the defendants is the failure of the bill to set out the "places of residence of the plaintiffs in the cause, and "also the places of residence of the defendants. The "bill alleges the plaintiffs to be citizens of Maryland, "and the defendants to be citizens of Virginia. * * * * "If there were but one judicial district in Virginia, the "omission to state Richard Roe's place of residence "might not be demurrable, and might be amended on "mere motion. But there are two districts in Virginia "and the bill must give jurisdiction in the district in "which the suit is brought. It is of jurisdictional es- "sence that the bill shall allege that Richard Roe is a "citizen of Virginia, resident at some place, alleged to "be in the Eastern District of Virginia. The bill at "bar uses no other language in describing the defend- "ants than to say that the suit is against "The Rich- "mond & Manchester Railway Company, and the "Richmond Railway & Electric Company, corporations "duly incorporated under the laws of the State of Vir- "ginia, and as such citizens of Virginia." That is all. "There is no allegation that the defendant companies "are residents, respectively, of Richmond and of Man- "chester, in the Eastern District of Virginia. * * * * "The omission is jurisdictional, and is demurrable. The "fact that a corporation is resident in Richmond, and "has its office for the transaction of its business in Rich- "mond cannot be implied from the mere circumstance "that "Richmond" is a word used in the corporate "name. It is a fundamental rule of pleading that im- "plications cannot supply allegations. Certainty and "precision are the essence of pleading, and all material "averments must be positive and express. Implications "even necessary implications, can never dispense with "material allegations. The bill here is demurrable and "defective in not containing all averments giving juris- "diction of the cause to the Circuit Court of the United "States for the Eastern District."

Harvey vs. Richmond & M. Ry. Co., et al., 54 Fed., Rep., 19.

"Where the only ground of jurisdiction of the Fed-"eral court is the diverse citizenship of the parties and "this shows that the defendant is a citizen and resident "of another state, under the Judiciary Act of 1888 it "must aver in the declaration not only that the plaintiff "is a citizen of the state, but that he is a resident of the "district in which the suit is brought."

In the opinion in this case the court says:

"The plaintiff is described in the declaration merely "as a citizen of the state of New Jersey. * * * * "It is apparent that a person may be a resident of a "state of which he is not a citizen, and in like manner "he may be a citizen of a state in which he is not a resi-"dent. To give this court jurisdiction in this cause, it "should appear that the plaintiff is a citizen of the state "of New Jersey and a resident of the District of New "Jersey. The declaration does not contain these neces-"sary averments. Judgment, therefore, for the defend-"ant."

Miller vs. Penna. R. R. Co., 91 Fed. Rep. 298. (1899.)

"The complaint filed in this case shows upon its face "diverse citizenship, but does not allege that either the "plaintiffs or defendant reside within this judicial dis-"trict; and the question presented and argued by coun-"sel is whether, under the provisions of the present Ju-"diciary Act, it is essential that the complaint should "show that the suit is brought in the district of the res-"idence of either the plaintiffs or defendant, where, as "here, jurisdiction is founded only on the fact that the "action is between citizens of different states. The "Judiciary Act of 1789 provides: 'And no civil suit "'shall be brought before either of said courts against "'an inhabitant of the United States by any original "'process in any other district than that whereof he is

" 'an inhabitant, or in which he shall be found at the
" 'time of serving the writ.'

"Substantially the same provision was incorporated "into the Revised Statutes (sec 739) and into the Judi- "ciary Act of 1875. Under each of those Acts a de- "fendant might be sued, not only in the district of which "he was an inhabitant, but also in any district in which "he was found at the time of serving the writ; and it "was repeatedly held that the provision in those acts in "respect to the district in which every civil suit should "be brought was not a jurisdictional requirement, but "the grant of a privilege to the defendant, which might "be waived; and, therefore, that it was not necessary to "aver that the defendant was an inhabitant of the dis- "trict, or was found therein. * * * The Act of "August 13th, 1888, leaves out the fact that if the de- "fendant have the diverse citizenship required by the "statute he may be sued in any district where he may "be found at the time of the service of process.

" 'The omission of these words,' said the Supreme "Court in *Smith vs. Lyon,* 133 U. S., 315, * * * " 'show the purpose of the legislature to restrict rather " 'than to enlarge the jurisdiction of the circuit courts, " 'while, at the same time, a suit is permitted to be " 'brought in any district where either plaintiff or de- " 'fendant resides.' * * * *

" 'In the case before us one of the plaintiffs is a citi- " 'zen of the state where the suit is brought, namely, the " 'state of Missouri, and the defendant is a citizen of " 'the state of Texas. But one of the plaintiffs is a " 'citizen of the state of Arkansas. The suit, so far as " 'he is concerned, is not brought in the state of which " 'he is a citizen. Neither as plaintiff nor as defendant " 'is he a citizen of the district where the suit is brought. " 'The argument in support of the error assigned is that " 'it is sufficient if the suit is brought in a state where " 'one of the defendants or one of the plaintiffs is a " 'citizen. This would be true if there were but one " 'plaintiff or one defendant. But the statute makes no " 'provision, in terms, for the case of two defendants or " 'two plaintiffs who are citizens of different states. In

" 'the present case, there being two plaintiffs, citizens of
" 'different states, there does not seem to be any provis-
" 'ion that both plaintiffs may unite in a state of which
" 'either of them is a citizen.' * * *

"This decision is, I think, conclusive of the question "here. It is well settled that the circuit courts have no "jurisdiction except such as is conferred by the con- "stitution and laws of the United States, and that to "bring a case within the jurisdiction must be affirmative- "ly shown. It would seem to follow necessarily that "the complaint or other pleading by which the suit is "commenced must show that the case is within the jur- "isdiction of the court; * * * the circuit court "has no jurisdiction of a suit where jurisdiction is "founded only on the fact that the action is between "citizens of different states unless brought in the dis- "trict of the residence of either the plaintiff or defend- "ant. A complaint in such case must show that either "the plaintiff or defendant resides within the district "in which the suit is brought, in order to overcome "the adverse presumption, and that jurisdiction be "affirmatively shown. *Timmons vs. Land Company,* "139 U. S., 378. * * * No reason is per- "ceived why the objection may not also be taken by "demurrer where the want of jurisdiction is manifest "because of the absence of averments necessary to "show jurisdiction." Demurrer sustained.

Laskey et al., vs. Newtown Min. Co., 50, Fed., Rep., 634., 1892.

"The presumption is that a cause is without its jur- "isdiction unless the contrary affirmatively appear."

Grace vs. American Central Insurance Co., 109, U. S., 278.
Peper vs. Fordyce, 119 U. S., 467.

"Consent of parties can never confer jurisdiction "upon a Federal court. If the record does not affirma- "tively show jurisdiction in the circuit court this court "must upon its own motion so declare and make such

"order as will prevent the circuit court from exercising
"an authority not conferred upon it by statute."

Minnesota vs. Northern Securities Co., 194 U. S., 48.

"Jurisdiction of a circuit court of the United States
"must appear affirmatively from distinct allegations or
"facts clearly proven and is not to be established argu-
"mentatively or by mere inference, and when jurisdic-
"tion depends upon diverse citizenship absence of suffi-
"cient averments or of facts in the record showing such
"diversity is fatal and the defect cannot be waived by
"the parties, nor can consent confer jurisdiction."

Thomas vs. Board of Trustees of O. S. University, 195 U. S., 207.

Counsel for appellants recognizes this, for near the top of page 4 of his brief, he says:

"(B) They have sued the defendant in the district
"in which it is a resident;"

and at the bottom of page 5 of his brief he states:

"The defendant can alone be sued in the Federal
"court in the Northern District of West Virginia, where
"it had its domicile."

Throughout the brief, counsel discusses the residence of the defendant in the Northern District of West Virginia as if it were a fact. The record will be searched in vain to find a single syllable justifying the assertion that the defendant is a resident of the Northern District of West Virginia. It is true that the defendant was served with process in the Northern District of West Virginia, but that fact is not sufficient to establish the residence of the defendant. The physical fact of being found in a district has no element of residence. It hardly seems necessary to discuss the difference between the two.

"RESIDENCE. Living or dwelling in a certain place permanently or for a considerable length of time. The place where a man makes his home or where he dwells permanently for an extended period of time. Residence means a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence. So does 'inhabitancy', and the two are distinguished in this respect from 'domicile'." 8 *Wendell*, 134.

Black's Law Dictionary, page 1032.

Third. It appears upon the face of the declaration that the plaintiffs are partners but where the partnership is domiciled does not appear, and it appears that, as individuals, one of the plaintiffs was a citizen of the State of New York and the other was a citizen of the State of Pennsylvania, and as such they are suing the defendant as a citizen of the State of West Virginia.

Counsel for appellants practically admits that he can find no decision affirming or deciding the exact point in controversy here.

At the bottom of page 2 of his argument he says:

"While no construction of the statute involving the "jurisdiction of the circuit court, of causes where there "are more than one plaintiff and where such plaintiffs "are citizens of different states seems to have been "made by this court, there are cases where the right to "sue defendants who are citizens of different states has "been determined."

The fact that he admits that there has been no decision which he can find sustaining his position is significant, and, still more, it is certainly true.

On this point, however, we differ with counsel for appellants and think that the Supreme Court of the United States has heretofore given expresion of opinion upon the exact point in controversy in this case, if it did not directly decide it. In *Smith vs. Lyon,* 133 U. S., page 315, the following language is used:

> "The argument in support of error assigned is that "it is sufficient if the suit is brought in a state where "one of the defendants or one of the plaintiffs is a "citizen. This would be true if there were but one "plaintiff or one defendant. But the statute makes no "provision, in terms, for the case of two defendants or "two plaintiffs who are citizens of different states."

The jurisdiction of the circuit court depends entirely upon the statute and laws of the United States, and if the statute makes no provision in terms for the case of two plaintiffs who are citizens of different states instituting a suit, then how can this suit be maintained, except "provisions" and "terms" be read into the statute which Congress did not place there.

It is evident from the reading of every decision of this court upon the question of jurisdiction of the circuit court from the case of *Strawbridge vs. Curtiss,* 3 Cranch, page 267, down to the present time, that the court has stood by the words and "terms" of the statute without attempting to hold that this case or that, is included in the "spirit" of the statute. And, therefore, if the statute makes no provision in terms for the case of two plaintiffs who are citizens of different states to maintain a suit in the Circuit Court of the United States, nothing but the terms of the statutes will be considered, and this will be fatal to the jurisdiction of the court.

We maintain that both in letter and spirit this construction of the statute is eminently right and just. It will be

admitted without argument that the defendant in this case, if the claimed rights of the parties were transferred, could not sue the plaintiffs in this case. If it should sue Sweeney in the state of New York, then Halbert J. Porterfield would insist that he was not being sued in the state of which he is a citizen and in the district in which he is a resident, and if it should sue Porterfield in the state of Pennsylvania, then Sweeney would justly urge that he was being sued in a state of which he was not a citizen and in a district in which he was not a resident. Do not the very terms of the act show that Congress intended there should be mutuality as to the right to sue and be sued? Can it be believed that Congress intended that I should have a right to sue and, if my rights were at the moment transferred to the persons whom I am suing, they would not have the right to sue me?

Can anyone read into the statute the meaning that two plaintiffs, each of different states, may maintain a suit against a citizen of still a different state, but one plaintiff, of a different state, cannot maintain a suit against two defendants of different states? If jurisdiction in this case is sustained that will be exactly what the statute will be construed to mean, something that no word or syllable in any of the decisions of this court or in the statute can be found to indicate.

The language just quoted from *Smith vs. Lyon* is borne out by every decision of this court which has been rendered. In the first case, that of *Strawbridge vs. Curtiss*, 3 Cranch, page 267, the opinion in which was rendered by Chief Justice Marshall, says:

> "The court understands these expressions to mean "that each distinct interest should be represented by per- "sons all of whom are entitled to sue or may be sued in "the Federal courts."

In the present case the essential ground mentioned in that case is lacking—that is, the plaintiffs, instead of "may be sued", cannot be sued. Thus it clearly appears that the first expression of this court upon the question involved in this suit was that it understood and held the statute to mean that there must be a mutuality of right of action.

Appellants' counsel realizes the grave difficulty in which this contention places him, for at the bottom of page 5, continued on page 6, of his brief, he attempts to show that there is a mutuality of action. But we earnestly insist that under the allegations of his declaration there can be no possibility of mutuality of action.

Appellants claim, although without anything whatever in the record to sustain it, that defendant is a resident of the Northern District of West Virginia, and, therefore, if the defendant could be found in the Northern District of West Virginia, it might be sued in the district of the residence of the defendant, should it be transposed to the position of the plaintiffs, but as has before been shown in paragraph second of this argument, there is no allegation in appellants' declaration nor any syllable in the record to show that defendant is a resident of the Northern District of West Virginia, and certainly there is nothing to show that either of the plaintiffs are residents of the Northern District of West Virginia. Therefore, if appellants should be correct in their arguments, if the facts were true, which is in no wise admitted, the defendant, if it were plaintiff, could not sue them in the Northern District of West Virginia, because under the allegations of the declaration neither the plaintiff nor either of the defendants would be residents of the Northern District of West Virginia, and, therefore, suit could not be brought in a district in which neither plaintiff nor defendant were residents.

The argument of appellants' counsel admits that if the parties are located and if conditions existed as at the time

this suit was brought, the defendant could not maintain a suit against the plaintiffs in the circuit court, but, he thinks something might turn up, and the two plaintiffs, if the defendant had cause of action against them, might come to West Virginia, supposedly for the purpose of being sued, and might be sued in the Northern District of that state. Practically, then, the mutuality of action would depend on the act of the appellants, something which the statute surely never intended.

Appellants' counsel in discussing the case of *Smith vs. Lyon, supra,* at the top of page 15 of his brief, says:

> "The plaintiffs being residents of different states "could not sue the defendant in either of these states, "but the plaintiffs could have sued the defendant Lyon "in the state of Texas, had they gone there."

In the earlier part of his brief counsel for appellants admits that there is no decision of this court to sustain this proposition, and we submit that there can be no decision of any other court nor any word from any authority to sustain this proposition, but on the contrary the very authority which he cites condemns the proposition by saying, on page 317:

> "But the statute makes no provision in terms for the "case of two defendants or two plaintiffs who are citi- "zens of different states."

That is, that the statute does not provide for two plaintiffs of different states to maintain a suit against anyone, in whatever state he may be.

It seems useless to say anything further upon this proposition than to cite the various decisions of this court upon this phase of diverse citizenship necessary to the jurisdiction of the Federal courts, viz:

Strawbridge vs. Curtiss, 3 Cranch, 267;
Hepburn vs. Elsie, 2 Cranch, 445;
New Orleans vs. Winter, 1 Wheaton, 91;
Peninsular Iron Company vs. Stone, 121 U.S., 632;
Barney vs. Baltimore, 6 Wall., 280
Smith vs. Lyon, 133 U. S., 315;
Merchants vs. Insurance Company, 151 U. S., 368;
Hooe vs. Jemison, 166 U. S., 395.

Fourth. The citizenship of both the plaintiffs and the defendant is not charged by direct positive averment, but only by way of recital and inference.

The part of the declaration in which citizenship is charged is as follows:

> "Francis B. Sweeney, a resident in and citizen of the state of New York, and Halbert J. Porterfield, a resident in and citizen of the state of Pennsylvania, partners doing business under the firm name and style of Sweeney & Porterfield, complain of the Carter Oil Company, a corporation organized and existing under and by virtue of the laws of the state of West Virginia, and as such a citizen thereof."

The court will observe that it is not charged that Sweeney is a resident and citizen of the state of New York, or that Porterfield is a resident and citizen of the state of Pennsylvania, or that the Carter Oil Company is a resident of the state of West Virginia, and, therefore, there is no direct and affirmative allegation as to the citizenship of either the plaintiffs or the defendant. The allegation is merely in form of recital, and the citizenship is a matter of inference.

> "In a declaration or complaint the facts upon which jurisdiction arises must be expressly set forth or alleged in such a manner as to render them certain by legal intendment. (2.) So, also, must the facts conferring jurisdiction upon some other tribunal of special juris-

diction upon whose proceedings the pleader in the action relies." (3).

Ency. of Pleading & Practice, Vol. 6, page 254, Notes 2 and 3.
Clark vs. Harkness, 2 Ill., 56;
Wakefield vs. Goudy, 4 Ill., 133;
De Nobele vs. Lee, 47 N. Y. Super Ct., 372.

"Material facts should be alleged by direct averment, and not by inference." (6).

Ency. of Pleading & Practice, Vol. 6, page 269, Note 6;
Stringer vs. Davis, 30 Cal., 318;
Moore vs. Besse, 30 Cal., 570;
Busk vs. Cella, 52 Ark., 378;
West vs. American Exchange Bank, 44 Barb. (N. Y.), 175;
Brown vs. Harmon, 21 Barb. (N. Y.), 508;
Thompson vs. Munger, 15 Tex., 523;
Gregory vs. McFarland, 1 Duv. (Ky.), 59.

"Facts must be directly averred, and not pleaded by way of recitals." (5).

Ency. of Pleading & Practice, Vol. 6, 270, Note 5;
Cathcart vs. Peck, 11 Minn., 45;
Roberts vs. Lovell, 38 Wis., 211.

The Certificate of the Circuit Court Judge to this Court.

The provision of the law regarding such certificates is as follows:

"That appeals or writs of error may be taken from district or from existing circuit courts, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Under this provision of the statute, can any of the questions before the lower court be eliminated from consideration by this court by the certificate of the judge of the circuit court? If so, then the question set out in the first and fourth paragraphs of the statement of facts herein might be eliminated from consideration, and this court would consider only the question involved in paragraphs 2 and 3 of the statement of facts.

But is anything eliminated by an inadvertent admission from the certificate of all of the facts before the lower court for consideration? The statute provides for appeals and writs of error direct from the circuit court to this court in case the jurisdiction of the lower court is in issue, just in the same usual and ordinary way in which writs of error and appeals are taken in all other cases, but adds that the question of jurisdiction shall alone be certified.

Is the certificate entirely to eliminate and supersede the record? Must the certificate alone be looked to, or can the record be considered in determining all the facts in question so far as the jurisdiction of the court is concerned? If the latter proposition is not true, then what the necessity for an appeal or writ of error? Why not a simple stay of proceedings in the lower court and the certificate of the circuit judge alone forwarded to this court? Is not the reasonable construction of the statute that the question of jurisdiction is to be embodied in the record and sent up for consideration the same as the record in any other appeal or writ of error and the certificate of the court to be used merely as a matter of convenience to draw the attention of this court to the real facts in issue without requiring it to take the trouble to examine a cumbersome record? But if the certificate should be found not to embody all the facts, then the record would

be at hand for the consideration and examination of the court in order to determine all of the facts involved.

Will not this court, regardless of the omission from the certificate of the lower court of two grounds of want of jurisdiction, look into and consider all the grounds of want of jurisdiction apparent upon the face of the record? We are not aware that any construction of Section 5 of the Acts of March 3, 1891, under which this writ of error is taken to this court, has ever been made in this respect. However, from the very liberal construction given this statute by this court, it seems that all of the facts involved and apparent on the face of the record showing the want of jurisdiction will be considered and passed upon by the court.

U. S. vs. Jahn, 155 U. S., 109;
Re Lehigh Mining & Manufacturing Company, 156 U. S., 322;
Minnesota vs. Northern Securities Co., 194 U. S. 48.

We, therefore, respectfully submit that the judgment of the circuit court in this cause was right and that the same should be affirmed.

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